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Operation and Construction of Deeds Student Symposium - Texas Land Titles.

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OPERATION AND CONSTRUCTION OF DEEDS

One of the prime objectives in conveying real property is the drafting of deeds which clearly and accurately reflect the intention of the parties. Since there are frequent instances where the intention of the parties is indiscernible, various rules have developed to aid the courts in the construction of these ambiguous deeds. These rules can be used only when the intention of the parties, particularly the grantor, cannot be determined from the language of the deed.[24] Although this intention is critical in interpreting an ambiguous deed, the effect of a deed must be determined from the language of the deed itself and cannot be supplied by the court.[25]

INTERPRETING AMBIGUOUS DEEDS THROUGH RULES OF CONSTRUCTION

Some criteria are necessary in order to distinguish a deed which is poorly worded from one which is so ambiguous that it is ineffectual to transfer land. A statement which on its face is ambiguous can be made certain by parol evidence, other legal instruments incorporated into the deed, and by consideration of the deed in the factual setting of its execution.[26] A frequent example occurs when the description of the property in a deed identifies the land conveyed by its common name in the area.[27] Even though the description seems patently ambiguous, if the property can be identified by its common name by the parties to the instrument, the description is effective.[28] If the nominal description is in conflict with a specific metes and bounds description, it will not prevail; but if the generic description is the only identification cited in the deed, it will operate as a valid description.[29]

When possible the deed should be construed as a whole, with effect given

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24. Vogel v. Allen, 118 Tex. 196, 200, 13 S.W.2d 340, 342 (1929); Daniel v. Henry, 30 Tex. 26, 28 (1867); Milton v. Davis, 443 S.W.2d 605, 609 (Tex. Civ. App.—Tyler 1969, writ ref'd n.r.e.).

25. Texas Pac. Coal & Oil Co. v. Masterson, 160 Tex. 548, 553, 334 S.W.2d 436, 439 (1960); Ulbricht v. Friedsam, 159 Tex. 607, 613, 325 S.W.2d 669, 673 (1959); Wood v. Coastal States Crude Gathering Co., 482 S.W.2d 954, 956 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.); Wilson v. Humble Oil & Ref. Co., 82 S.W.2d 1095, 1096-97 (Tex. Civ. App.—Texarkana 1935, writ ref'd).

26. Gresham v. Chambers, 80 Tex. 544, 548, 16 S.W. 326, 327 (1891); Jamison v. City of Pearland, 489 S.W.2d 636, 641 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.); Townsend v. Day, 224 S.W. 283, 285 (Tex. Civ. App.—Fort Worth 1920), *rev'd on other grounds*, 238 S.W. 213 (Tex. Comm'n App. 1922, jdgmt adopted).

27. Roberts v. Dreyer, 200 S.W. 1097, 1098 (Tex. Civ. App.—San Antonio 1918, writ ref'd). The land was described as "the old Dreyer homestead."

28. The property description is effective but will not prevail over metes and bounds description. *Id.* at 1098.

29. *Id.* at 1098.

to all the parts.[30] Additionally, each part should be considered, and no part should be excluded unless it is clearly in conflict with the rest of the deed.[31] The construction of a deed may, however, depend on the interpretation of a particular phrase.

When a deed is susceptible to a dual interpretation, the construction which operates to effectuate a conveyance is preferred over one which nullifies the transfer.[32] This rule is based on two premises: (1) that the existence of an instrument of conveyance evidences the parties' intent to convey, and (2) that deeds should be liberally construed in order to effect the intent of the parties.[33] Additionally, if either of two reasonable interpretations will result in an effective deed, the court will adopt the construction which is most favorable to the party who did not draft the instrument.[34]

Although the problems encountered in determining the operation and effect of a single deed are difficult, prior or contemporaneously executed instruments raise special problems. Texas has eliminated many of these by adopting the merger doctrine which creates a legal presumption that prior negotiations and agreements are automatically embodied in the deed: if the instruments were a part of the same transaction and concern the same subject matter, they should be construed as a single document.[35] Related instruments which may be merged in a deed include contracts for the sale of land, security agreements, and even other deeds.[36]

30. Johnson v. McDonnell, 37 Tex. 505, 601 (1872); Benskin v. Barksdale, 246 S.W. 360, 363 (Tex. Comm'n App. 1923, jdgmt adopted); Broussard v. Middleton, 496 S.W.2d 766, 769 (Tex. Civ. App.—Beaumont 1973), *rev'd on other grounds*, 504 S.W.2d 839 (Tex. 1974); Dilbeck v. Bill Gaynier, Inc., 368 S.W.2d 804, 807 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.); Hinds v. Parmley, 315 S.W.2d 159, 165-66 (Tex. Civ. App.—Beaumont 1958, no writ).

31. Associated Oil Co. v. Hart, 277 S.W. 1043, 1044 (Tex. Comm'n App. 1925, holding approved); *see* Broussard v. Middleton, 496 S.W.2d 766, 769-70 (Tex. Civ. App. —Beaumont 1973), *rev'd on other grounds*, 504 S.W.2d 839 (Tex. 1974).

32. Rekdahl v. Long, 417 S.W.2d 387, 389 (Tex. 1967); Kelly v. Womack, 153 Tex. 371, 377, 268 S.W.2d 903, 906 (1954); Hancock v. Butler, 21 Tex. 804, 806 (1858); Hunting v. Jones, 215 S.W. 959, 961 (Tex. Comm'n App. 1919, jdgmt adopted).

33. Hedick v. Lone Star Steel Co., 277 S.W.2d 925, 928 (Tex. Civ. App.—Texarkana 1955, writ ref'd n.r.e.). *See genreally* Perkins v. Smith, 476 S.W.2d 902 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.).

34. Garrett v. Dils Co., 157 Tex. 92, 95, 299 S.W.2d 904, 906 (1957); Stevens v. Galveston H. & S.A. Ry., 212 S.W. 639, 643 (Tex. Comm'n App. 1919, jdgmt adopted); Wood v. Coastal States Crude Gathering Co., 482 S.W.2d 954, 956 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.); Young v. Rudd, 226 S.W.2d 469, 473 (Tex. Civ. App.—Texarkana 1950, writ ref'd n.r.e.).

The controlling principle is that an instrument is to be construed strictly against its maker. McBride v. Hutson, 157 Tex. 632, 637, 306 S.W.2d 888, 891-92 (1957); Wood v. Coastal States Crude Gathering Co., 483 S.W.2d 954, 956 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.).

35. Commercial Bank, Uninc. v. Satterwhite, 413 S.W.2d 905, 909 (Tex. 1967); Carter v. Barclay, 476 S.W.2d 909, 914-15 (Tex. Civ. App.—Amarillo 1972, no writ).

36. Jamison v. City of Pearland, 489 S.W.2d 636, 641 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.); Murphy v. Jamison, 117 S.W.2d 127, 132 (Tex. Civ. App.—Beaumont 1938, writ ref'd); Boulware v. Kempner, 36 S.W.2d 527, 529-30 (Tex.

The particular language used in a deed may be invoked to aid in the construction of an ambiguous instrument. Spelling errors do not affect deed construction; words are interpreted according to their plain meaning.[37] Similarly, punctuation errors will not control the construction of a deed in derogation of the words actually used.[38] Words are generally given their usual and ordinary meaning, but when words have technical or legal significance, these technical meanings will be adopted unless the words were obviously used in another context.[39] When a deed is executed on a printed form, and handwritten words conflict with those of the form, the written words control[40] on the presumption that the written words were deliberately added in order to express the most recent desires of the parties.[41]

Another problem in deed construction occurs when there are conflicting clauses. One frequently encountered conflict arises when the estate conveyed in the granting clause differs from that specified in the habendum. Texas courts have held that when an irreconcilable conflict exists, the granting clause controls.[42] Because the courts favor the validity of the instrument, no clause should be invalidated unless the conflict renders the implementation of one of the clauses totally incompatible with the other.[43] Between conflicting clauses, an interpretation of their terms determines which provision will prevail; but when clauses conflict with reservations, restrictions, or conditions, the clauses—in their entirety—control.[44] When provisions in a deed are inconsistent, a specific provision will control over a general one.[45] In addition,

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Civ. App.—Waco 1931, no writ); Schoellkopf v. Bryan, 284 S.W. 339, 342 (Tex. Civ. App.—San Antonio 1926, writ ref'd).

37. Anderson & Kerr Drilling Co. v. Bruhlmeyer, 134 Tex. 574, 580, 136 S.W.2d 800, 803 (1940).

38. Harriss v. Ritter, 154 Tex. 474, —, 279 S.W.2d 845, 847 (1955).

39. Pitts v. Camp County, 120 Tex. 558, 580, 39 S.W.2d 608, 616 (1931); Holloway's Unknown Heirs v. Whatley, 104 S.W.2d 646, 648 (Tex. Civ. App.—Beaumont 1937), *aff'd*, 133 Tex. 608, 131 S.W.2d 89 (1939).

40. Krister v. First Nat'l Bank, 463 S.W.2d 751, 754-55 (Tex. Civ. App.—Beaumont), *writ ref'd n.r.e. per curiam*, 467 S.W.2d 408 (Tex. 1971); Gibson v. Watson, 315 S.W.2d 48, 52 (Tex. Civ. App.—Texarkana 1958, writ ref'd n.r.e.); J.K. Hughes Oil Co. v. Mayflower Inv. Co., 193 S.W.2d 971, 973 (Tex. Civ. App.—Texarkana 1946, writ ref'd).

41. *See generally* Gibson v. Watson, 315 S.W.2d 48 (Tex. Civ. App.—Texarkana 1958, writ ref'd).

42. Lott v. Lott, 370 S.W.2d 463, 465 (Tex. 1963); Waters v. Ellis, 158 Tex. 342, 347, 312 S.W.2d 231, 234 (1958). *See also* Coastal States Gathering Co. v. Cummings, 415 S.W.2d 240, 242 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.).

43. Cockrell v. Texas Gulf Sulphur Co., 157 Tex. 10, 17, 299 S.W.2d 672, 676 (1956); Benge v. Scharbauer, 152 Tex. 447, 451, 259 S.W.2d 166, 167 (1953); Selman v. Bristow, 402 S.W.2d 520, 523 (Tex. Civ. App.—Tyler), *writ ref'd n.r.e. per curiam*, 406 S.W.2d 896 (Tex. 1966); Phillips Petroleum Co. v. Lovell, 392 S.W.2d 748, 750 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.).

44. Germany v. Turner, 132 Tex, 491, 497, 123 S.W.2d 874, 877 (1939); Hidalgo County v. Pate, 443 S.W.2d 80, 84 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.); Gulf Oil Corp. v. Shell Oil Co., 410 S.W.2d 260, 264-65 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.).

45. McAnally v. Texas Co., 124 Tex. 196, 203, 76 S.W.2d 997, 1000 (1934);

if the first part of a deed is definite, the deed will not be altered by an irreconcilable statement which appears in a later clause.[46]

Although most deeds can be interpreted through the use of rules of construction, some cases require an examination of the acts of the parties in order to determine their intent. Both the circumstances surrounding the execution of the deed and the construction placed on the deed by the parties themselves as evidenced by their acts and declarations aid in deed construction.[47] Unless it is repugnant to the terms of the grant or some unbending law of construction, the intention of the parties as determined by the surrounding circumstances is a controlling factor in construing an ambiguous deed.[48] The meaning given to a deed by the acts and declarations of the parties should be accorded great weight by the court unless contrary to clear language in the deed.[49] *Shults v. Bartz*,[50] for example, concerned an instrument which could have been interpreted as granting either an easement or a fee simple interest. The court held that where both parties had later treated the conveyance as a transfer of a fee simple, the deed was to be construed as having conveyed a fee simple estate.[51] An unilateral act, however, will not be considered binding on the other party, but may be taken into account if it weakens the actor's claim.[52] Declarations of intent expressed in legal writings other than the deed are admissible evidence and are entitled to great weight in determining the intent of the parties.[53] In *Henderson v. Book*[54]

Sanger Bros. v. Roberts, 92 Tex. 312, 316, 48 S.W. 1, 2 (1898); Milton v. Davis, 443 S.W.2d 605, 608 (Tex. Civ. App.—Tyler 1969, writ ref'd n.r.e.).

46. Benskin v. Barksdale, 246 S.W. 360, 363 (Tex. Comm'n App. 1923, holding approved); Pan American Petroleum Corp. v. Southland Royalty Co., 396 S.W.2d 519, 522 (Tex. Civ. App.—El Paso 1965, writ dism'd).

47. Anderson & Kerr Drilling Co. v. Bruhlmeyer, 134 Tex. 574, 583, 136 S.W.2d 800, 805 (1940); Smith v. Davis, 453 S.W.2d 340, 345 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.); High v. Glameyer, 428 S.W.2d 872, 875 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.); Cutrer v. Cutrer, 334 S.W.2d 599, 603 (Tex. Civ. App.—San Antonio 1960), *aff'd*, 162 Tex. 166, 345 S.W.2d 513 (1961).

48. Smith v. Davis, 453 S.W.2d 340, 345 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.); Hedick v. Lone Star Steel Co., 277 S.W.2d 925, 928 (Tex. Civ. App.—Texarkana 1955, writ ref'd n.r.e.).

49. Shults v. Bartz, 431 S.W.2d 416, 420 (Tex. Civ. App.—Fort Worth 1968), *aff'd sub nom.* Coffield v. Schutts, 464 S.W.2d 947 (Tex. 1971); Gulf Coast Water Co. v. Hamman Exploration Co., 160 S.W.2d 92, 96 (Tex. Civ. App.—Galveston 1942, writ ref'd); Texas & N.O.R. v. Orange County, 206 S.W. 539, 544 (Tex. Civ. App.—Beaumont 1918, writ ref'd).

50. 431 S.W.2d 416 (Tex. Civ. App.—Fort Worth 1968), *aff'd sub nom.* Coffield v. Shutts, 464 S.W.2d 947 (Tex. 1971).

51. *Id.* at 420.

52. *See* Way v. Venus, 35 S.W.2d 467, 468 (Tex. Civ. App.—El Paso 1931, no writ).

53. Shults v. Bartz, 431 S.W.2d 416, 419 (Tex. Civ. App.—Fort Worth 1968), *aff'd sub nom.* Coffield v. Shutts, 464 S.W.2d 947 (Tex. 1971); Gulf Coast Water Co. v. Hamman Exploration Co., 160 S.W.2d 92, 96 (Tex. Civ. App.—Galveston 1942, writ ref'd); Henderson v. Book, 128 S.W.2d 117, 120 (Tex. Civ. App.—San Antonio 1939, writ ref'd); Murphy v. Jamison, 117 S.W.2d 127, 132-33 (Tex. Civ. App.—Beaumont 1938, writ ref'd); Way v. Venus, 35 S.W.2d 467, 468 (Tex. Civ. App.—El Paso 1931, no writ).

54. 128 S.W.2d 117, 120 (Tex. Civ. App.—San Antonio 1939, writ ref'd).

an ambiguous deed conveyed a disputed interest in the mineral estate. The court determined the interest conveyed by construing the deed with other mineral deeds and leases subsequently executed by the grantor.[55]

Judicial construction of deeds generally results in the exclusion of one of the parties claiming an interest in the property. The most common exception to this occurs when judicial interpretation results in the creation of a cotenancy. When a conveyance is made to two grantees and the deed is silent as to what interest each is to receive, each grantee will receive an undivided one-half interest in the entire property.[56] The conveyance will be considered to be of a tenancy in common unless this is contrary to the specific intent of the parties as expressed in the deed.[57] This designation is important in that when a joint tenant with a right of survivorship dies, the land held in joint tenancy passes to the other tenant; the share of a tenant in common passes to his heirs.[58] Most modern deeds specifically provide for a tenancy in common and, in Texas, other problems in construction have been largely resolved by statute.[59]

Equally important as the identification of what interest was conveyed is determination of the time at which the deed became effective to vest the grantee's rights in the property. Since a conveyance generally takes effect on delivery of the deed, the question of what is necessary to accomplish delivery is of primary importance.[60] For example, if a deed is delivered to an escrow agent, title passes on delivery by the third party to the grantee, but the rights under the title relate back to the time of the grantor's delivery to the escrow agent, and the rights of the parties are determined at that time.[61]

LOCATING THE PROPERTY DESCRIBED

The most troublesome problem area in deed construction is determining from the description incorporated in the deed the specific property which has been conveyed. Ambiguous descriptions create problems in determining where the land is located and how much land is to be conveyed. While there are general rules for the construction of ambiguous descriptions, if a descrip-

55. *Id.* at 120.

56. John Hancock Mut. Life Ins. Co. v. Bennett, 133 Tex. 450, 458, 128 S.W.2d 791, 795-96 (1939); *see* Terrill v. Davis, 418 S.W.2d 333, 336 (Tex. Civ. App.—Eastland 1967, writ ref'd n.r.e.).

57. Texas has abolished the inference creating a joint tenancy. Joint tenancies must be specifically established or the co-tenancy will be deemed a tenancy in common. TEX. PROB. CODE ANN. § 46 (1956).

58. *Id.*

59. *Id.* The presumption against the creation of a joint tenancy has greatly reduced problems in this area.

60. Tuttle v. Turner, Wilson & Co., 28 Tex. 759, 773-74 (1866); Wilson v. Dearing, Inc., 415 S.W.2d 475, 478-79 (Tex. Civ. App.—Eastland 1967, no writ); Phillips v. Woodard, 327 S.W.2d 622, 625 (Tex. Civ. App.—Texarkana 1959, no writ).

61. Henry v. Phillips, 105 Tex. 459, 466, 151 S.W. 533, 538 (1912); *see* Wilson v. Dearing, 415 S.W.2d 475, 478-79 (Tex. Civ. App.—Eastland 1967, no writ); McKnight v. Reed, 71 S.W. 318, 319 (Tex. Civ. App. 1902, no writ).

tion is so ambiguous that the court cannot determine with reasonable certainty the amount or the location of the land conveyed, the conveyance is void under the statute of frauds.[62] In order to identify the land the court may consider extrinsic evidence in conjunction with the description in the deed.[63] The deed's sufficiency should be determined not only by interpreting its specific section containing the property description, but also by examining the deed as a whole.[64] An inadequate description can render an instrument void as a conveyance, but a deed containing a faulty description may still operate as a binding contract for the sale of land.[65]

The most prevalent inconsistencies in deed descriptions occur between general and specific descriptions and between the intentions of the grantor and the grantee. Particular descriptions will control when they conflict with general ones unless they are in direct conflict with the clear intention of the parties.[66] Therefore, a deed specifically identifying survey and block numbers will not modify a general description referring to a subsequent conveyance.[67] For example, if a particular tract of land is named it will be conveyed even though it exceeds the amount of acreage mentioned in the deed.[68]

When the parties' intention is uncertain, the construction which will identify the land and make the deed valid is always adopted.[69] Thus, if the grantor and grantee claim that different amounts of property have been conveyed, the courts will usually hold the conveyance valid and convey the great-

62. TEX. REV. CIV. STAT. ANN. art. 1288 (1962); Greer v. Greer, 144 Tex. 528, 530, 191 S.W.2d 848, 849 (1946); Coker v. Roberts, 71 Tex. 597, 602, 9 S.W. 665, 667 (1888); Kingston v. Pickins, 46 Tex. 99, 101 (1876); *see* Best Inv. Co. v. Hernandez, 479 S.W.2d 759, 764 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).

63. Maupin v. Chaney, 139 Tex. 426, 431, 163 S.W.2d 380, 383 (1942); Chapman v. Crichet, 127 Tex. 590, 596, 95 S.W.2d 360, 363-64 (1936); Lohff v. Germer, 37 Tex. 578, 580 (1872); Jamison v. City of Pearland, 489 S.W.2d 636, 641 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.).

64. Gates v. Asher, 154 Tex. 538, —, 280 S.W.2d 247, 249 (1955); Cleveland v. Sims, 69 Tex. 153, 155, 6 S.W. 634, 635 (1887); Wood v. Coastal States Crude Gathering Co., 482 S.W.2d 954, 956 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.).

65. Douthit v. Robinson, 55 Tex. 69, 75 (1882). The basic difference in a deed and a contract to sell are the more strict requirements for execution of the deed. For example, a contract would not have to describe the property as accurately as a deed.

66. Sun Oil Co. v. Burns, 125 Tex. 549, 557, 84 S.W.2d 442, 445-46 (1935); McAnally v. Texas Co., 124 Tex. 196, 203, 76 S.W.2d 997, 1000 (1934); Sanger Bros. v. Roberts, 92 Tex. 312, 316, 48 S.W. 1, 2 (1898); *see* McDowell v. Coker, 472 S.W. 545, 546 (Tex. Civ. App.—Tyler 1971, no writ); Texas Osage Co-operative Royalty Pool v. Clark, 314 S.W.2d 109, 112-13 (Tex. Civ. App.—Amarillo 1958), *aff'd*, 159 Tex. 441, 322 S.W.2d 506 (1959).

67. Texas Osage Co-operative Royalty Pool v. Clark, 314 S.W.2d 109, 112-13 (Tex. Civ. App.—Amarillo 1958), *aff'd*, 159 Tex. 441, 322 S.W.2d 506 (1959).

68. Temple Lumber Co. v. Mackechney, 228 S.W. 177, 179 (Tex. Comm'n App. 1921, jdgmt adopted); *see* Dallas Title & Guar. Co. v. Valdes, 445 S.W.2d 26, 28 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.).

69. Gates v. Asher, 154 Tex. 538, —, 280 S.W.2d 247, 248 (1955); Kingston v. Pickins, 46 Tex. 99, 102-103 (1876); Perkins v. Smith, 476 S.W.2d 902, 907 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.); Jasper State Bank v. Goodrich, 107 S.W.2d 600, 602-603 (Tex. Civ. App.—Beaumont 1937, writ dism'd).

est possible estate.[70] By following the "strip and gore" theory of deed construction, Texas courts generally hold that where a small strip located within a larger tract is omitted from the deed description, the entire tract, including that portion omitted, is conveyed unless there is evidence of contrary intent.[71] Even when particular descriptions are inconsistent, the description which conveys the greatest estate will be adopted.[72]

The description of a small tract to be conveyed out of a larger one must be sufficient to positively identify the tract conveyed. The first step in analyzing the sufficiency of the description is to determine whether the conveyance intended was of an individual interest in a specific parcel or of an undivided interest in the entire tract. If the intention of the grantor was to convey an undivided interest in the entire property, the parties become tenants in common.[73] If, on the other hand, the grantor was attempting to convey an individual estate in a portion of the whole tract, even though no particular parcel is identified in the instrument, some courts have held that the grantee has an equitable right to select his specific tract.[74] This right of selection has produced considerable controversy. While some courts adhere to the rule that there is an equitable right of selection by the grantee,[75] other courts have stated that the right of selection must be specifically mentioned in the deed.[76] If, on the other hand, a particular parcel is intended to be conveyed out of a larger tract but is described so poorly that it cannot be located, the deed is void.[77] Generally, when a certain number of acres is intended to be conveyed out of a larger tract, and no attempt is made to

70. Hancock v. Butler, 21 Tex. 804, 812 (1858); Stewart v. Mobley, 500 S.W.2d 246, 250 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.).

71. Angelo v. Biscamp, 441 S.W.2d 525, 526-27 (Tex. 1969); Strayhorn v. Jones, 157 Tex. 136, 158, 300 S.W.2d 623, 638 (1957); Miller v. Crum, 314 S.W.2d 389, 395 (Tex. Civ. App.—Fort Worth 1958, no writ).

72. Hasty v. McKnight, 460 S.W.2d 949, 953 (Tex. Civ. App.—Texarkana 1970, writ ref'd n.r.e.); Standefer v. Miller, 182 S.W. 1149, 1151 (Tex. Civ. App.—Amarillo 1916, no writ).

73. *See* Turner v. Hunt, 131 Tex. 492, 494, 116 S.W.2d 688, 690 (1938); Dohoney v. Womack, 19 S.W. 883, 884-85 (Tex. 1892); Williams v. Kirby Lumber Corp., 355 S.W.2d 761, 763 (Tex. Civ. App.—Beaumont 1962, writ ref'd n.r.e.); Lawrence v. Barrow, 117 S.W.2d 116, 118-19 (Tex. Civ. App.—Galveston 1938, writ dism'd).

74. Turner v. Hunt, 131 Tex. 492, 494, 116 S.W.2d 688, 690 (1938); Wofford v. McKinna, 23 Tex. 36, 46 (1859); *see* Seawall v. Waetcher, 268 S.W.2d 262, 264 (Tex. Civ. App.—Galveston 1954, writ ref'd n.r.e.); Wing v. Red, 145 S.W. 301, 303 (Tex. Civ. App.—Galveston 1912, writ ref'd).

75. Turner v. Hunt, 131 Tex. 492, 495-96, 116 S.W.2d 688, 690-91 (1938). *See generally* Seawall v. Waetcher, 268 S.W.2d 262 (Tex. Civ. App.—Galveston 1954, writ ref'd n.r.e.).

76. *See* Wofford v. McKinna, 23 Tex. 36, 46 (1859); Gray v. Producer's Oil Co., 227 S.W. 240, 241 (Tex. Civ. App.—Galveston 1921, no writ).

77. Lawrence v. Barrow, 117 S.W.2d 116, 119 (Tex. Civ. App.—Galveston 1938, writ dism'd); Caddell v. Lufkin Land & Lumber Co., 234 S.W. 138, 145 (Tex. Civ. App. —Beaumont 1921), *aff'd*, 255 S.W. 397 (Tex. Comm'n App. 1923, jdgmt adopted); *see* Pan American Petroleum Corp. v. Texas & Pac. Coal & Oil Co., 340 S.W.2d 548, 553 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.).

locate the particular acreage, the deed will be construed as a conveyance of an undivided interest in the whole.[78]

As a general rule courts attempt to give some effect to an instrument of conveyance; thus, if omitting an unclear portion will clarify the whole, that portion should be rejected.[79] The description may be rejected if it is manifestly erroneous and if enough of the description remains to identify the land conveyed.[80] In some cases courts have even allowed the description to be reformed,[81] and if the intention of the parties can be ascertained from the faulty description, the court may change the description to fit the intention.[82] For example, if a description does not "close," the court will attempt to find the error and "draw" the lines so as to coincide with the area intended to be conveyed.[83] It is therefore possible to "save" deeds with erroneous but determinable descriptions.

Although descriptions can be "cured" by rejecting erroneous provisions and reforming the deed, extrinsic evidence, particularly parol evidence and documents referred to in the deed, is significant in clarifying deed descriptions. Numerous deeds which might have been invalid due to an inadequate description have been validated by combining them with descriptions in other instruments.[84] Such instruments may be incorporated only when they are specifically referred to by the deed in question.[85] In such a case both instruments will be construed jointly and harmonized if possible.[86] Although

78. Williams v. Kirby Lumber Corp., 355 S.W.2d 761, 763-64 (Tex. Civ. App.—Beaumont 1962, writ ref'd n.r.e.); Lawrence v. Barrow, 117 S.W.2d 116, 119 (Tex. Civ. App.—Galveston 1938, writ dism'd).

79. Griswold v. Comer, 161 S.W. 423, 428 (Tex. Civ. App.—Galveston 1913), *aff'd and reformed*, 209 S.W. 139 (Tex. Comm'n App. 1919, jdgmt adopted); Dallas Title & Guar. Co. v. Valdes, 445 S.W.2d 26, 28 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.).

For example, in Hutchinson v. East Texas Oil Co., 167 S.W.2d 205, 208 (Tex. Civ. App.—Galveston 1942, writ ref'd w.o.m.), the deed description stated that the boundary followed the "margin of the river" to the "north*west*" corner, but only the "north*east*" corner of the property bordered the river. The court rejected the description mistake and substituted the proper description. *Id.* at 208.

80. Arambula v. Sullivan, 80 Tex. 615, 620, 16 S.W. 436, 438 (1891); Hunt v. Evans, 233 S.W. 854, 856 (Tex. Civ. App.—Austin 1921, writ ref'd); *see* Dallas Title & Guar. Co., 445 S.W.2d 26, 28 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.).

81. *See generally* Austin Lake Estates Recreation Club, Inc. v. Gilliam, 493 S.W.2d 343, 348 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.); Coastal Builders Inc. v. Barker, 259 S.W.2d 591, 595-96 (Tex. Civ. App.—Galveston 1953), *aff'd*, 153 Tex. 540, 271 S.W.2d 798 (1954).

82. Austin Lake Estates Recreation Club, Inc. v. Gilliam, 493 S.W.2d 343, 348 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.).

83. Baldwin v. Willis, 253 S.W.2d 287, 292 (Tex. Civ. App.—Beaumont 1952, writ ref'd n.r.e.).

84. Pierson v. Sanger, 93 Tex. 160, 164, 53 S.W. 1012, 1013-14 (1899); Scheller v. Groesbeck, 231 S.W. 1092, 1093 (Tex. Comm'n App. 1921, jdgmt adopted); Harris v. Windsor, 279 S.W.2d 648, 649 (Tex. Civ. App.—Texarkana 1955), *aff'd*, 156 Tex. 324, 294 S.W.2d 798 (1956).

85. Fuentes v. Hirsch, 472 S.W.2d 288, 293 (Tex. Civ. App.—El Paso 1971, writ ref'd n.r.e.).

86. Brown v. Chambers, 63 Tex. 131, 135 (1885); Bowles v. Beal, 60 Tex. 322, 324

a judicial controversy exists concerning what circumstances justify reference to another instrument, the trend is toward admitting any words that adequately identify the incorporated documents.[87] Parol evidence is admissible even to identify the instrument to which the deed refers.[88] If there are ambiguous references to two instruments which are equally applicable, this may render the deed void due to insufficient description.[89] The liberal trend in admission has been implemented to avoid this harsh result. Therefore, almost any legal document which contains a sufficient description can be incorporated by reference into a deed in order to assist in describing the property conveyed.[90]

A variation in language between the deed in question and the incorporated document is not fatal if the combined descriptions adequately identify the land, but if there is a material conflict, the deed will usually control.[91] If the description referred to differs from the primary description, parol evidence is admissible to explain the discrepancy.[92] Thus, where a deed stated that the property was bounded by a certain street, and referred to a city map which did not show the street, parol evidence was admitted to explain the discrepancy.[93] In some instances the document referred to will control in place of the original deed description, as, for example, when the incorporated description conveys a greater estate than that in the original deed. If the discrepancy is not too great, the greater estate will be conveyed.[94] There is no specific maximum variation allowable between a deed and an instrument of reference, but as much as a twenty acre difference in a 640 acre tract has been held to have been part of the estate conveyed.[95]

While most deed descriptions can be ascertained from the language of the

1883); Fuentes v. Hirsch, 472 S.W.2d 288, 293 (Tex. Civ. App.—El Paso 1971, writ ref'd n.r.e.).

87. *See, e.g.*, Overand v. Menczer, 83 Tex. 122, 127-28, 18 S.W. 301, 303 (1892); Perkins v. Smith, 476 S.W.2d 902, 907 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.).

88. Overand v. Menczer, 83 Tex. 122, 127-28, 18 S.W. 301, 303 (1892); Zimpleman v. Stamps, 51 S.W. 341, 342 (Tex. Civ. App. 1899, no writ) (parol evidence admitted to establish that a town map, referred to in a deed, was the only town map).

89. Powers v. Minor, 87 Tex. 83, 88, 26 S.W. 1071, 1072 (1894); *see* Robinson v. Humble Oil & Ref. Co., 301 S.W.2d 938, 945 (Tex. Civ. App.—Texarkana 1957, writ ref'd n.r.e.).

90. Houston Oil Co. v. Kimball, 103 Tex. 94, 106, 122 S.W. 533, 539 (1909); Hermann v. Likens, 90 Tex. 448, 454-55, 39 S.W. 282, 283 (1897); Curdy v. Stafford, 88 Tex. 120, 123, 30 S.W. 551, 552 (1895) (a bounty warrant); Bitner v. New York & Tex. Land Co., 67 Tex. 341, 342, 3 S.W. 301, 301-302 (1887) (land certificates); Stienbeck v. Stone, 53 Tex. 382, 386 (1880) (a recorded deed).

91. Cruger v. Ginnuth, 3 Will Civ. Case App. § 27 (1885).

92. St. Louis, S.F. & T. Ry. v. Payne, 104 S.W. 1077, 1078 (Tex. Civ. App. 1907, writ ref'd); *see* Gage v. Owen, 435 S.W.2d 559, 562 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.).

93. St. Louis, S.F. & T. Ry. v. Payne, 104 S.W. 1077, 1078 (Tex. Civ. App. 1904, writ ref'd).

94. Flanagan v. Boggess, 46 Tex. 330, 335-36 (1876).

95. *Id.* at 335-36. The court said the entire tract was to pass whether 640 or 620 acres.

deed, or by the use of a description in an incorporated instrument, it is sometimes necessary to consider parol evidence to explain a deed description.[96] The basis for the introduction of parol evidence must be some description of a general type in the deed, which lends itself to explanation by parol evidence. Lacking such general description, parol evidence would be inadmissible under the statute of frauds.[97] Parol evidence is admissible to clarify the description included in a deed but is never allowed to supply a description where there is none in the instrument.[98] In addition, parol evidence cannot add to, subtract from, or otherwise contradict the description contained in the deed,[99] and a description which is full and complete on its face will preclude the introduction of parol evidence.[100] If mistake or fraud is alleged, however, parol evidence is admissible.[101]

Some Texas courts have held that the admissibility of parol evidence should be based on the distinction between patent and latent ambiguities.[102] If the ambiguity is patent, that is, if it appears on the face of the instrument, then parol evidence will not be allowed to explain it.[103] Even if the description is incomplete on its face, there will be no finding of a patent ambiguity if the court, by placing itself in the position of the parties, can determine their intended meaning.[104] When a description is complete and unambiguous on the face of the instrument, but an ambiguity arises when the description is applied to the land, the ambiguity is latent and may be explained by parol evidence.[105] The rule that a deed should be considered in light of the sur-

96. *See* Smith v. Sorrelle, 126 Tex. 353, 358, 87 S.W.2d 703, 705 (1935); Norris v. Hunt, 51 Tex. 609, 614-15 (1879); Kingston v. Pickins, 46 Tex. 99, 101 (1876); Gulf States Utils. Co. v. Tonahill, 445 S.W.2d 593, 597 (Tex. Civ. App.—Beaumont) *writ ref'd per curiam*, 446 S.W.2d 301 (Tex. 1969).

97. Continental Supply Co. v. Missouri K. & T. Ry., 269 S.W. 1040 (Tex. Comm'n App. 1925, jdgmt adopted); Crosby v. Davis, 421 S.W.2d 138, 141 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.).

98. *See* Smith v. Sorrelle, 126 Tex. 353, 358, 87 S.W.2d 703, 705 (1935); Norris v. Hunt, 51 Tex. 609, 614-15 (1879); Crosby v. Davis, 421 S.W.2d 138, 141 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.).

99. Smith v. Sorrelle, 126 Tex. 353, 358, 87 S.W.2d 703, 705 (1935); Gill v. Peterson, 126 Tex. 216, 222, 86 S.W.2d 629, 632 (1935); Davis v. George, 104 Tex. 106, 110, 134 S.W. 326, 328 (1911); Cole v. Citizens First Nat'l Bank, 364 S.W.2d 746, 748 (Tex. Civ. App.—Texarkana 1963, writ ref'd n.r.e.).

100. Muller v. Landa, 31 Tex. 265, 268 (1868); Melton v. Davis, 443 S.W.2d 605, 608 (Tex. Civ. App.—Tyler 1969, writ ref'd n.r.e.).

101. Clark v. Gregory, 87 Tex. 189, 191, 27 S.W. 56, 57 (1894); Farley v. Deslonde, 69 Tex. 458, 461, 6 S.W. 786, 788 (1888); State v. Keeton Packing Co., 487 S.W.2d 775, 778 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.).

102. State v. Egger, 347 S.W.2d 630, 632 (Tex. Civ. App.—Austin 1961, no writ); McDougal v. Conn, 195 S.W. 627, 634-35 (Tex. Civ. App.—Beaumont 1917, no writ).

103. Coker v. Roberts, 71 Tex. 597, 602, 9 S.W. 665, 667 (1888); State v. Egger, 347 S.W.2d 630, 632 (Tex. Civ. App.—Austin 1961, no writ).

104. McDougal v. Conn, 195 S.W. 627, 635 (Tex. Civ. App.—Beaumont 1917, no writ).

105. Clark v. Gregory, 87 Tex. 189, 191, 27 S.W. 56 (1894); Frost v. Erath Cattle Co., 81 Tex. 505, 510-11, 17 S.W. 52, 55 (1891); Arambula v. Sullivan, 80 Tex. 615, 618, 16 S.W. 436, 437 (1891); Kingston v. Pickins, 46 Tex. 99, 101 (1876); Universal

rounding circumstances is obviously frustrated when the ambiguity is classified as patent.

The patent-latent distinction has been criticized as too broad, out-dated,[106] and as precluding consideration of evidence which would reveal the intent of the parties.[107] The practical effect of the patent-latent distinction is that when courts want to hear extrinsic evidence they conveniently find the ambiguity to be latent.[108]

DETERMINING THE INTEREST CONVEYED

While descriptions pertain to the amount and location of the land, questions and controversies also arise when a deed contains conflicting recitals of the estate or interest conveyed. The basic rule in this area is that the greatest estate allowed by the terms of the deed will be deemed to have been conveyed.[109] This rule has been so extended that unless there is clear language to the contrary, the deed will pass whatever interest the grantor has in the property.[110] This has often led to harsh constructions against the grantor, and, as a result, limitations have been placed on the extent to which a court can construe the language in a deed.[111] For example, the type of estate conveyed cannot be determined or enlarged by a covenant of a warranty.[112] Another limitation applies when the conveyance does not expressly reserve a vendor's lien.[113] Strict compliance with the general rule would result in conveyance of the entire legal and equitable estate of the vendor, but in Texas the vendor retains an implied lien which reserves his equitable title.[114]

Home Builders, Inc. v. Farmer, 375 S.W. 737, 742 (Tex. Civ. App.—Tyler 1964, no writ).

106. Battle v. Wolfe, 283 S.W. 1073, 1075-76 (Tex. Civ. App.—Amarillo 1926, writ ref'd); Meyers v. Maverick, 28 S.W. 716 (Tex. Civ. App. 1894, no writ).

107. Battle v. Wolfe, 283 S.W. 1073, 1076 (Tex. Civ. App.—Amarillo 1926, writ ref'd).

108. *Id.* at 1077-78; McDougal v. Conn, 195 S.W. 627, 635 (Tex. Civ. App.—Beaumont 1917, no writ).

109. Stevens v. Galveston, H. & S.A. Ry., 212 S.W. 639, 643 (Tex. Comm'n App. 1919, jdgmt adopted); Stewart v. Mobley, 500 S.W.2d 246, 250 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.).

110. Sharp v. Fowler, 151 Tex. 490, 494, 252 S.W.2d 153, 154 (1952); Stewart v. Mobley, 500 S.W.2d 246, 250-51 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.).

111. Duhig v. Peavy-Moore Lumber Co., 135 Tex. 503, 507-508, 144 S.W.2d 878, 880-81 (1940); Rio Bravo Oil Co. v. Hunt Petroleum Corp., 439 S.W.2d 853, 859 (Tex. Civ. App.—Tyler 1969), *rev'd on other grounds*, 455 S.W.2d 722 (Tex. 1970).

112. Duhig v. Peavy-Moore Lumber Co., 135 Tex. 503, 507-508, 144 S.W.2d 878, 881 (1940).

113. Zapata v. Torres, 464 S.W.2d 926, 928 (Tex. Civ. App.—Dallas 1971, no writ); Rhiddlehoover v. Boren, 260 S.W.2d 431, 433 (Tex. Civ. App.—Texarkana 1953, no writ).

114. Zapata v. Torres, 464 S.W.2d 926, 928 (Tex. Civ. App.—Dallas 1971, no writ);

Constructions of the interest conveyed and the resulting rights of the parties are greatly affected by the type of instrument used. Although the construction of recitals in a deed determines what estate the grantor attempted to convey, the use of a warranty deed or a quitclaim deed is critical in determining what estate has been conveyed and the grantor's legal relation to that estate. A warranty deed conveys the estate named in the instrument, guaranteeing that title to that estate rests in the grantor and that the estate conveyed will not be lost by the grantee due to any claim of superior title existing at the time of conveyance.[115] The quitclaim deed, however, conveys title only to the interest that the grantor actually owns at the time of the conveyance.[116] The most important effect of conveying title by quitclaim deed is that the grantee gets the grantor's title subject to any limitation *existing at the time of the conveyance*,[117] and any interest subsequently acquired by the grantor does not inure to the benefit of the grantee.[118] The quitclaim does serve a useful purpose since, between the parties, it is as effective as a warranty deed in conveying the grantor's existing interest.[119] It should be noted that while a quitclaim is valid, a warranty deed is preferred, and the use of the word "quitclaim" in a deed does not so restrict the conveyance if the clear intent of the grantor was to convey warranted title.[120] If the intent of the parties cannot be determined from the deed, the warranty deed would be presumed because it conveys the greater estate.[121]

A warranty deed usually conveys a fee simple.[122] This estate will be

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Rhiddlehoover v. Boren, 260 S.W.2d 431, 433 (Tex. Civ. App.—Texarkana 1953, no writ).

115. TEX. REV. CIV. STAT. ANN. arts. 1292, 1293 (1962).

116. Manwaring v. Terry, 39 Tex. 67, 71-72 (1873); Victoria Bank & Trust Co. v. Cooley, 417 S.W.2d 814, 817 (Tex. Civ. App.—Houston 1967, writ ref'd n.r.e.).

117. Abraham v. Crow, 382 S.W.2d 756, 758 (Tex. Civ. App.—Amarillo 1964, no writ); Gulf Prod. Co. v. State, 231 S.W. 124, 133-34 (Tex. Civ. App.—San Antonio 1921, writ ref'd).

118. Gulf Prod. Co. v. State, 231 S.W.2d 124, 133 (Tex. Civ. App.—San Antonio 1921, writ ref'd).

119. Lott v. Lott, 370 S.W.2d 463, 465 (Tex. 1963).

120. Bryan v. Thomas, 365 S.W.2d 628, 630-31 (Tex. 1963); Miles v. Martin, 159 Tex. 336, 345, 321 S.W.2d 62, 68 (1959); Garrett v. Christopher, 74 Tex. 453, 454, 12 S.W. 67 (1889).

121. Lott v. Lott, 370 S.W.2d 463, 465 (Tex. 1963); Victoria Bank & Trust Co. v. Cooley, 417 S.W.2d 814, 819 (Tex. Civ. App.—Houston 1967, writ ref'd n.r.e.).

122. The warranty deed can also confer limited estates such as the conditional fee. *See* City of Dallas v. Etheridge, 152 Tex. 9, 13, 253 S.W.2d 640, 642 (1953); McCarthy v. City of Houston, 389 S.W.2d 159, 161 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.). The two most prevalent conditional estates are the fee simple determinable, Eyssen v. Zeppa, 100 S.W.2d 417, 418-19 (Tex. Civ. App.—Texarkana 1936, writ ref'd); Green v. Gresham, 53 S.W. 382, 384 (Tex. Civ. App. 1899, no writ); and the fee simple subject to a condition subsequent. *See* Fly v. Guinn, 2 Posey, Unrep. Cas. 300 (Tex. Comm'n App. 1880). *See generally* C. SMITH & R. BOYER, SURVEY OF THE LAW OF PROPERTY 9 (1971).

Another limited estate frequently conveyed by a warranty deed is one restricted to the extent of a measuring life. If such a conveyance creates a vested interest in the

presumed to have been granted unless a lesser estate is clearly expressed in the language of the deed.[123] Common law words of inheritance are not essential to the validity of a deed conveying a fee simple,[124] and a deed provision will not be construed to operate in derogation of a fee simple conveyance unless no other reasonable interpretation can be adopted.[125] Therefore, even in a case where land was granted for a specific purpose, the supreme court has held that it was reasonable to infer that a fee simple estate had been granted.[126]

DEFINING THE ESTATE RETAINED

Although the estate or interest which the grantor conveys is the usual object of deed construction, an area of equal importance is the construction of the estate or interests *retained* by the grantor. Rights retained by the grantor are referred to either as reservations or as exceptions.[127] In the past a deed which misnamed the estate retained was deemed ineffective to reserve or except an interest in the grantor.[128] Today these terms may be used interchangeably with no adverse effect on the estate retained.[129]

Creation of a reservation or exception does not require the use of technical terms or words of art, but the language used in creating a reservation or exception must clearly reflect the grantor's intention to do so because such limi-

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remainderman, there is a vested remainder. Kritser v. First Nat'l Bank, 463 S.W.2d 751, 755 (Tex. Civ. App.—Beaumont), *writ ref'd n.r.e. per curiam*, 467 S.W.2d 408 (Tex. 1971); Arnold v. Southern Pine Lumber Co., 123 S.W. 1162, 1166 (Tex. Civ. App. 1909, writ dism'd). A vested remainder is preferred in construction over a contingent remainder, since the contingent remainder can be defeated before the termination of the measuring life. *See* Kritser v. First Nat'l Bank, 463 S.W.2d 751, 755-56 (Tex. Civ. App. —Beaumont), *writ ref'd n.r.e. per curiam*, 467 S.W.2d 408 (Tex. 1971).

123. Cone v. Parish, 32 F. Supp. 412, 415 (N.D. Tex.), *aff'd sub nom.* Scott v. Cohen, 115 F.2d 704 (5th Cir. 1940), *cert. denied*, 312 U.S. 703 (1941); Lewis v. Midgett, 448 S.W.2d 548, 551 (Tex. Civ. App.—Tyler 1969, no writ).

124. TEX. REV. CIV. STAT. ANN. art. 1291 (1962).

125. Hughes v. Gladewater County Line Independent School Dist., 124 Tex. 190, 195, 76 S.W.2d 471, 473 (1934); Stewart v. Mobley, 500 S.W.2d 246, 250 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.) (conflicting reversionary interest was held to pass with the fee).

126. Hughes v. Gladewater County Line Independent School Dist., 124 Tex. 190, 195, 76 S.W.2d 471, 473 (1934).

127. An exception excludes from the operation of a deed some part of the land conveyed that would otherwise pass. Coyne v. Butler, 396 S.W.2d 474, 476 (Tex. Civ. App. —Corpus Christi 1965, no writ); Pitts v. Zavala-Dimmit Counties Water Imp. Dist. No. 1, 81 S.W.2d 801, 805 (Tex. Civ. App.—San Antonio 1935, no writ). A reservation refers to the estate the grantor has reserved in himself and is a new right created by the reserving clause. Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, 249-50, 254 S.W. 296, 299 (1923); *see* Coyne v. Butler, 396 S.W.2d 474, 476 (Tex. Civ. App.— Corpus Christi 1965, no writ).

128. *See* Donnell v. Otts, 230 S.W. 864, 865 (Tex. Civ. App.—Fort Worth 1921, no writ).

129. *See* Pick v. Lankford, 157 Tex. 335, 342-43, 302 S.W.2d 645, 650 (1957).

tations on the estate are not judicially favored.[130] Since policy in deed construction is to grant the greatest possible estate, any doubt as to whether a reservation or an exception has been created will be determined against such a limitation.[131] Although there is a strong presumption against the implied creation of an exception, one is effectively implied when a grantor conveys the entire fee to the grantee who then re-conveys a part of the estate to the grantor.[132]

In the construction of reservations and exceptions, as in construction of deeds in general, the controlling rule is that the intent of the parties as expressed by the language used in the deed will determine the effect of the conveyance.[133] The effect of a reservation is to limit the estate, and, as a result, reservations and exceptions may not be enlarged to include a greater estate or interest than is permitted by the clear intention of the parties.[134] When the deed is unclear and the effect of the reservation or exception indiscernible, the acts of the parties, and in particular the acts of the grantee in recognizing the rights granted in the deed, are given great weight by the court.[135] This is illustrated where a landowner conveys his land to X, reserving a certain acreage and X honors the reservation; the subsequent grantee of X cannot assert that the reservation was inadequately created.[136]

An exception or reservation will be strictly construed against the grantor when such reservations or exceptions limit the grantee's rights to free and unobstructed use of the land.[137] Where a reservation was created for the privilege of drilling an oil well, the Beaumont Court of Civil Appeals refused to hold that this reserved all of the oil and gas under the property conveyed.[138] A warranty deed containing exceptions or reservations which

130. Fuentes v. Hirsch, 472 S.W.2d 288, 293 (Tex. Civ. App.—El Paso 1971, writ ref'd n.r.e.); Collier v. Caraway, 140 S.W.2d 910, 913 (Tex. Civ. App.—Beaumont 1940, writ ref'd).

131. Fuentes v. Hirsch, 472 S.W.2d 288, 293 (Tex. Civ. App.—El Paso 1971, writ ref'd n.r.e.); *see* Ahrens v. Lowther, 233 S.W. 235, 237 (Tex. Civ. App.—San Antonio 1920, writ ref'd).

132. Jackson v. Overton, 18 S.W.2d 773, 775 (Tex. Civ. App.—Amarillo 1929, writ ref'd).

133. Milam v. Coleman, 418 S.W.2d 329, 331 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.); Security Dev. Co. v. Hidalgo County Drainage Dist. No. 1, 124 S.W.2d 178, 181 (Tex. Civ. App.—Amarillo 1939, no writ).

134. Blanks v. Dungan, 491 S.W.2d 182, 183 (Tex. Civ. App.—Beaumont 1973, no writ); Jones v. Sun Oil Co., 110 S.W.2d 80, 82-83 (Tex. Civ. App.—Texarkana 1937, writ ref'd).

135. Security Dev. Co. v. Hidalgo County Drainage Dist. No. 1, 124 S.W.2d 178, 181 (Tex. Civ. App.—Amarillo 1939, no writ); *see* Shults v. Bartz, 431 S.W.2d 416, 419 (Tex. Civ. App.—Fort Worth 1969), *aff'd*, 464 S.W.2d 947 (Tex. 1971); Way v. Venus, 35 S.W.2d 467, 468 (Tex. Civ. App.—El Paso 1931, no writ).

136. Pick v. Lankford, 157 Tex. 335, 341, 302 S.W.2d 645, 649 (1957).

137. Collier v. Caraway, 140 S.W.2d 910, 913 (Tex. Civ. App.—Beaumont 1940, writ ref'd). *But see* Fuentes v. Hirsch, 472 S.W.2d 288, 293 (Tex. Civ. App.—El Paso 1971, writ ref'd n.r.e.).

138. Collier v. Caraway, 140 S.W.2d 910, 913 (Tex. Civ. App.—Beaumont 1940, writ ref'd).

would make such warranties ineffective is construed to give the exceptions or reservations no effect.[139] Reservations and exceptions are considered to be a type of specific description, so when a reservation or exception conflicts with a general description, the reservation or exception controls.[140] Although the use of exceptions and reservations is the most frequent device employed to restrict and limit the estate conveyed, there are other ways in which a grantor may restrict an estate.

Frequently a grantor will convey a conditional estate.[141] Conditions, as related to Texas land titles, are either conditions precedent or conditions subsequent. If there is a condition subsequent, the grantee *may* be divested of title if the condition is not fulfilled and if the grantor makes the affirmative action of re-entry.[142] For example, in a case where land was conveyed for park purposes, the failure of the city to establish the park was a breach of condition subsequent, and the estate revested in the grantor.[143] The condition subsequent should not be confused with a determinable fee. A breach of the condition in a determinable fee automatically terminates the estate which then re-vests in the grantor by operation of law.[144] The condition subsequent is distinguishable in that the breach of the condition does not terminate the estate, but merely gives rise to a cause of action for re-entry by the grantor.[145]

Because their breach causes a forfeiture of the estate, conditions are not favored by the courts and are construed to be covenants whenever possible.[146] Although no particular words are necessary to create conditions,[147] the mere declaration of the uses to which the property may be put will not create a condition or limit the title granted.[148] Some Texas courts have held that in

139. Jung v. Peterman, 194 S.W. 202, 205 (Tex. Civ. App.—San Antonio 1917, writ ref'd); *accord*, McClung v. Lawrence, 430 S.W.2d 179, 180 (Tex. 1968).

140. Koenigheim v. Miles, 67 Tex. 113, 122, 2 S.W. 81, 86 (1886). *See generally* 19 TEX. JUR. 2d *Deeds* § 181 (1960).

141. City of Dallas v. Etheridge, 152 Tex. 9, 12-13, 253 S.W.2d 640, 642 (1953); Kritser v. First Nat'l Bank, 463 S.W.2d 751, 755 (Tex. Civ. App.—Beaumont), *writ ref'd n.r.e. per curiam*, 467 S.W.2d 408 (Tex. 1971).

142. Community of Priests of St. Basil v. Byrne, 255 S.W. 601, 603 (Tex. Comm'n App. 1923, jdgmt adopted); Green v. Gresham, 53 S.W. 382, 384 (Tex. Civ. App. 1899, no writ).

143. City of Dallas v. Etheridge, 152 Tex. 9, 13, 253 S.W.2d 640, 642 (1953).

144. Community of Priests of St. Basil v. Byrne, 255 S.W. 601, 603 (Tex. Comm'n App. 1923, jdgmt adopted); *see* Holmes v. McKnight, 373 S.W.2d 541, 546 (Tex. Civ. App.—Corpus Christi 1963, no writ).

145. City of Dallas v. Etheridge, 152 Tex. 9, 13, 253 S.W.2d 640, 642 (1953); Stewart v. Mobley, 500 S.W.2d 246, 249 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.).

146. Zapata v. Torres, 464 S.W.2d 926, 929 (Tex. Civ. App.—Dallas 1971, no writ).

147. Dilbeck v. Bill Gaynier, Inc., 368 S.W.2d 804, 807 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.); Hudson v. Caffey, 179 S.W.2d 1017, 1019 (Tex. Civ. App.—Texarkana 1944, writ ref'd w.o.m.); *cf.* Zapata v. Torres, 464 S.W.2d 926, 929 (Tex. Civ. App.—Dallas 1971, no writ).

148. Hughes v. Gladewater County Line Independent School Dist., 124 Tex. 190, 194, 76 S.W.2d 471, 473 (1934); Olcott v. Gabert, 86 Tex. 121, 125, 23 S.W. 985, 986 (1893).

the creation of a condition subsequent it is necessary that a right of re-entry be clearly expressed.[149] In one case where the grantor had conveyed a tract of land on condition that a house was to be constructed, when no house was constructed, there was no forfeiture because no right of re-entry had been expressly reserved.[150]

A condition will be held invalid if it conflicts with public policy or with the law.[151] For example, a condition in restraint of marriage has been held invalid as contrary to public policy.[152] A more complex public policy consideration is restraint on alienation. The validity of such a condition depends on the degree of restraint it imposes on the grantee's use and enjoyment of the property. A condition which uniformly restrains any transfer of the property is void, but a limited condition which restrains only a narrow and particular alienation, such as prohibiting sale to a certain person or for a reasonable period of time, is generally valid.[153]

One exception within this rigid policy is that if the instrument contains a provision for penalty other than forfeiture, the restraint is enforceable.[154] A monetary penalty for breach of a condition against alienation would be valid and enforceable since it would not cause a forfeiture.[155]

An invalid condition does not necessarily destroy the grant. Generally, when a court renders a condition invalid, the effect is to remove only the condition and the other provisions remain valid and binding.[156]

Restrictive covenants, like exceptions and reservations, are limitations on a fee estate. They differ, however, in that only the grantee's use of the property is restricted. A grantor may restrict the grantee's use of property in any manner which does not conflict with public policy or positive law.[157]

149. Zapata v. Torres, 464 S.W.2d 926, 929 (Tex. Civ. App.—Dallas 1971, no writ); Harris v. Rather, 134 S.W. 754, 755 (Tex. Civ. App. 1911, writ ref'd).

150. Harris v. Rather, 134 S.W. 754, 755 (Tex. Civ. App. 1911, writ ref'd).

151. Liberty Annex Corp. v. Dallas, 289 S.W. 1067, 1069-70 (Tex. Civ. App.—Dallas 1926), *aff'd*, 295 S.W. 591 (Tex. Comm'n App. 1927, jdgmt adopted).

152. 26 C.J.S. *Deeds* § 143 (1956).

153. Laval v. Staffle, 64 Tex. 370, 372 (1885); McGaffey v. Walker, 379 S.W.2d 390, 394 (Tex. Civ. App.—Eastland 1964, writ ref'd n.r.e.).

154. *See* Bouldin v. Miller, 87 Tex. 359, 367, 28 S.W. 940, 941-42 (1894); Outlaw v. Bowen, 285 S.W.2d 280, 283 (Tex. Civ. App.—Amarillo 1955, writ ref'd n.r.e.).

155. Bouldin v. Miller, 87 Tex. 359, 367, 28 S.W. 940, 941 (1894).

156. Seay v. Cockrell, 102 Tex. 280, 286, 115 S.W. 1160, 1163 (1909); Bouldin v. Miller, 87 Tex. 359, 368, 28 S.W. 940, 941 (1894); O'Connor v. Thetford, 174 S.W. 680, 681-82 (Tex. Civ. App.—San Antonio 1915, writ ref'd); Diamond v. Rotan, 124 S.W. 196, 198 (Tex. Civ. App. 1909, writ ref'd); *accord*, McGaffey v. Walker, 379 S.W.2d 390, 394 (Tex. Civ. App.—Eastland 1964, writ ref'd n.r.e.).

157. Curlee v. Walker, 112 Tex. 40, 43, 244 S.W. 497, 498 (1922); Hill v. Trigg, 286 S.W. 182, 184 (Tex. Comm'n App. 1926, jdgmt adopted); Parker v. Delcoure, 455 S.W.2d 339, 343 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.).

Such restrictions often benefit the vendor by maintaining property uniformity until all the sales are made. Restrictions may also benefit purchasers in preventing some use of property that will interfere with the value or enjoyment of their own property. Curlee v. Walker, 112 Tex. 40, 43, 244 S.W. 497, 498 (1922).

Property which is conveyed for certain uses only is limited in title to the purposes which have specifically been enumerated.[158]

The application of the statute of frauds to restrictions is determined by the restriction itself. If a restriction is deemed to be a servitude, or if a restriction constitutes consideration for the sale of land, then the statute of frauds requires a writing.[159] Conversely, a restriction which is a part of a general plan or scheme is enforceable although not in writing.[160] Restrictions may be created by mutual covenant, but such restrictions must be universal and reciprocal among all the grantees of parcels in one tract in order to be valid as a neighborhood scheme or a general plan.[161]

Restrictions on use are not favored, and as a result courts tend to strictly construe restrictions so as to limit their effect.[162] An unambiguous restriction will be construed by the language of the instrument and may not be enlarged or modified by construction.[163] If possible, an ambiguous restriction will be construed to effectuate the intention of the parties.[164] The language creating the restriction will be examined, and the words used will be given their commonly accepted meaning; but if an ambiguity still exists, the language will be construed against the grantor and for the free use of the land.[165]

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158. Texas Elec. Ry. v. Neale, 244 S.W.2d 329, 332 (Tex. Civ. App.—Waco 1951), *rev'd on other grounds*, 151 Tex. 526, 252 S.W.2d 451 (1952); West Texas Utils. Co. v. Lee, 26 S.W.2d 457, 458 (Tex. Civ. App.—Austin 1930, no writ).

159. Miller v. Babb, 263 S.W. 253, 254-55 (Tex. Comm'n App. 1924, jdgmt adopted); Pierson v. Canfield, 272 S.W. 231, 234 (Tex. Civ. App.—Dallas 1925, no writ). The restrictions in these cases were used as consideration in the transaction or as a servitude on the land. *See also* Fleming v. Adams, 392 S.W.2d 491, 495 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.).

160. Fleming v. Adams, 392 S.W.2d 491, 496 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.); Gordon v. Hoencke, 253 S.W. 629, 631 (Tex. Civ. App.—Galveston 1923, no writ); Wilson Co. v. Gordon, 224 S.W. 703, 706-707 (Tex. Civ. App.—Galveston 1920, writ dism'd). The principle applied to justify the enforcement of oral restrictions in this situation is estoppel in pais.

161. Taylor v. McLennan County Crippled Children's Ass'n, 206 S.W.2d 632, 636 (Tex. Civ. App.—Waco 1947, writ ref'd n.r.e.); Cannon v. Ferguson, 190 S.W.2d 831, 834 (Tex. Civ. App.—Fort Worth 1945, no writ); *see* Parker v. Delcoure, 455 S.W.2d 339, 343 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.).

162. Settegast v. Foley Bros. Dry Goods Co., 114 Tex. 452, 455, 270 S.W. 1014, 1016 (1925); Short v. Maison, 494 S.W.2d 940, 942 (Tex. Civ. App.—Amarillo 1973, no writ).

163. Short v. Maison, 494 S.W.2d 940, 942 (Tex. Civ. App.—Amarillo 1973, no writ); Walker v. Dorris, 206 S.W.2d 620, 622 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.); Crump v. Perryman, 193 S.W.2d 233, 235 (Tex. Civ. App.—Dallas 1946, no writ); Johnson v. Wellborn, 181 S.W.2d 839, 841 (Tex. Civ. App.—San Antonio 1944, writ ref'd w.o.m.).

164. Baker v. Henderson, 137 Tex. 266, 278, 153 S.W.2d 465, 471 (1941); Parker v. Delcoure, 455 S.W.2d 339, 343 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.); Couch v. Southhampton Civic Club, 313 S.W.2d 360, 363 (Tex. Civ. App.—Waco), *rev'd on other grounds*, 159 Tex. 464, 322 S.W.2d 516 (1958); Green v. Gerner, 283 S.W. 615, 616-17 (Tex. Civ. App.—Galveston 1926), *aff'd*, 289 S.W. 999 (Tex. Comm'n App. 1927, opinion adopted).

165. Baker v. Henderson, 137 Tex. 266, 276, 153 S.W.2d 465, 470 (1941); Settegast

The terms of restrictions determine what constitutes their breach, what remedies lie for a breach, and what parties can enforce the restrictions.[166] Any restriction which has been substantially performed is not considered to have been breached.[167] For example, in a case where a condition provided that the land was to be used for a "first class seminary," the court of civil appeals held that the construction and maintenance of a school was not a breach of condition even though the grantor insisted the school was to be used in religious instruction.[168] Restrictions are operative only for the time and to the extent specifically stated in the instrument.[169]

CONCLUSION

The operations and effects of the various provisions in deeds and other instruments of conveyance are of critical importance in Texas land titles. This importance is reflected in the attention this area of the law has been given by the courts. These decisions have attempted to give attorneys some basis on which to make deeds which clearly convey the desired estate. Courts have also attempted to clarify the area of exceptions and reservations, enabling attorneys to clearly distinguish the interests and rights conveyed from those not conveyed. Conditions and restrictions have been the area of greatest change and controversy. Although this area is constantly changing, case law has helped establish guidelines which will enable lawyers drafting conditions and restrictions to adequately restrict property use but stay within legally accepted standards. The decisions establishing the rules related to the interpretation, creation, validity and effect of these deed provisions have clarified and added structure to these areas of the law. These rules have also resulted in the establishment of certainty in the use of language as used in deeds and instruments of conveyance.

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v. Foley Bros. Dry Goods Co., 114 Tex. 452, 455, 270 S.W. 1014, 1016 (1925); Short v. Maison, 494 S.W.2d 940, 942 (Tex. Civ. App.—Amarillo 1973, no writ).

166. *See, e.g.*, Settegast v. Foley Bros. Dry Goods Co., 114 Tex. 452, 455, 270 S.W. 1014, 1016 (1925); Parker v. Delcoure, 455 S.W.2d 339, 343 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.).

167. Maddox v. Adair, 66 S.W. 811, 813 (Tex. Civ. App. 1901, writ ref'd); Cleghorn v. Smith, 62 S.W. 1096, 1097 (Tex. Civ. App. 1901, writ ref'd); *see* Hancox v. Peek, 355 S.W.2d 568, 569 (Tex. Civ. App.—Fort Worth 1962, writ ref'd n.r.e.).

168. Maddox v. Adair, 66 S.W. 811, 813 (Tex. Civ. App. 1901, writ ref'd).

169. Couch v. Southern Methodist University, 10 S.W.2d 973, 974 (Tex. Comm'n App. 1928, jdgmt adopted); Hancox v. Peek, 355 S.W.2d 568, 569 (Tex. Civ. App.—Fort Worth 1962, writ ref'd n.r.e.).