St. Mary's Law Journal

Volume 7 | Number 1 Article 8

3-1-1975

Procedural Aspects of Land Title Suits Student Symposium - Texas Land Titles: Part II.

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PROCEDURAL ASPECTS OF LAND TITLE SUITS

The laws of Texas provide for determination, recovery and protection of title to real property. A claimant, whether improver or titleholder, has access to both statutory and equitable procedures for the enforcement of any valid claim. Categorized as the suit under the doctrine of betterments, the suit to quiet title, and the suit in trespass to try title, these actions furnish a procedural structure for the resolution of the status of title.

DOCTRINE OF BETTERMENTS

In early common law the construction or placement of improvements[390] upon land was done at the improver's peril. The true owner of the property was entitled to any improvements placed upon the land without compensating the improver, notwithstanding the improver's good faith belief that he held the legal title to the land.[391] The common law eventually evolved to allow the improver to set-off the value of the improvements he had made against his liability to the owner for rents.[392] Texas courts never experienced this common law evolution, for they have always provided relief to the good faith improver.[393]

Known as "Betterment Acts,"[394] articles 7393-7401a provide recovery for the improver in specific situations.[395] In order to recover under these statutes, the improver must allege that he has been in possession of the premises adversely for at least 1 year under a good faith

390. Improvements are defined in County of Nueces v. Salley, 348 S.W.2d 397, 400 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.); *accord*, Hancox v. Peek, 355 S.W.2d 568, 569 (Tex. Civ. App.—Fort Worth 1962, writ ref'd n.r.e.). *See generally* 30 Tex. Jur. 2d *Improvements—Private* § 1 (1962).

391. *E.g.*, Thompson v. Illinois Cent. R.R., 129 N.E. 55, 56 (Ind. Ct. App. 1920); Hall v. Boatwright, 36 S.E. 1001, 1002 (S.C. 1900).

392. *See* Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823). The common law courts influenced by the civil law, adopted this rule of compensation. Searl v. School Dist. No. 2 In Lake County, 133 U.S. 553, 561 (1890).

393. Scott v. Mather, 14 Tex. 235, 238 (1855) (the court explains the influence of the civil law of Spain on the present "betterment" statutes of Texas); TEX. REV. CIV. STAT. ANN. art. 7393 (1960).

394. Miller v. Gasaway, 514 S.W.2d 90, 93 (Tex. Civ. App.—Texarkana 1974, no writ); 4 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY 36 (1961).

395. Notwithstanding the present statutory law, the improvements still inure to the landowner's benefit. Gause v. Gause, 430 S.W.2d 409, 417 (Tex. Civ. App.—Austin 1968, no writ); Howle v. Howle, 422 S.W.2d 252, 255 (Tex. Civ. App.—Tyler 1967, no writ). The improver's claim is only for money and the return of funds; it is not a right, title, or interest in the land. Burton v. Bell, 380 S.W.2d 561, 564 (Tex. 1964).

impression of ownership[396] and that permanent and valuable improvements have been made during that time. A description of these improvements and their value is also required.[397] In addition to this statutory remedy, a good faith improver is also entitled, in proper circumstances, to equitable relief in order to recover the value of his improvements.[398]

Under the statute possession entails a holding in good faith for 1 year, adverse to that of the true owner.[399] In equity, the 1-year possession requirement does not appear to be necessary,[400] and various grounds for possession have been held adequate to justify relief.[401]

Good faith, as required by the statute, is a necessity to recovery,[402] although an exception may arise in the application of estoppel against an owner who had notice of the making of the improvements.[403] Good faith may be defined as a belief, based on reasonable grounds, that the improver's title was superior title, free of any outstanding claims.[404]

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396. Dorn v. Dunham, 24 Tex. 366, 380 (1859); Miller v. Gasaway, 514 S.W.2d 90, 93 (Tex. Civ. App.—Texarkana 1974, no writ); *cf.* Gulf Prod. Co. v. Baton, 108 S.W.2d 960, 966 (Tex. Civ. App.—Texarkana 1937, writ ref'd).

397. TEX. REV. CIV. STAT. ANN. art. 7393 (1960); Burton v. Bell, 380 S.W.2d 561, 567 (Tex. 1964); Lindsay v. Clayman, 151 Tex. 593, 600, 254 S.W.2d 777, 781 (1952). Though the statute designates the improver as defendant indicating a preference of a cross-action for the improvements in a trespass to try title suit, the improver may bring an independent suit. Long v. Cude, 75 Tex. 225, 227-28, 12 S.W. 827, 828 (1889); Bagley v. Higginbotham, 353 S.W.2d 868, 869 (Tex. Civ. App.—Beaumont 1962, writ ref'd n.r.e.); Salazar v. Garcia, 232 S.W.2d 685, 689 (Tex. Civ. App.—San Antonio 1950, writ ref'd). A discussion of this allowance and its apparent conflict with TEX. R. CIV. P. 97 concerning compulsory and independent counterclaims may be found in Deal v. Carlton, 237 S.W.2d 1000, 1002 (Tex. Civ. App.—Galveston 1951, no writ).

398. Salazar v. Garcia, 232 S.W.2d 685, 689 (Tex. Civ. App.—San Antonio 1950, writ ref'd); Nilsen v. Bonugli, 220 S.W.2d 178, 180 (Tex. Civ. App.—San Antonio 1949, no writ).

399. Cooke v. Avery, 147 U.S. 375, 394 (1893); TEX. REV. CIV. STAT. ANN. art. 7393 (1960).

400. Pomeroy v. Pearce, 2 S.W.2d 431, 433 (Tex. Comm'n App. 1928, holding approved); Salazar v. Garcia, 232 S.W.2d 685, 689 (Tex. Civ. App.—San Antonio 1950, writ ref'd).

401. House v. Stone, 64 Tex. 677, 686 (1885) (possession based on a tax title); Pitts v. Booth, 15 Tex. 453, 454 (1855) (possession based on a tax title); Van Zandt v. Brantley, 42 S.W. 617, 619-20 (Tex. Civ. App. 1897, writ ref'd) (possession based on a conveyance by an unauthorized agent).

402. House v. Stone, 64 Tex. 677, 683 (1885); Miller v. Gasaway, 514 S.W.2d 90, 93 (Tex. Civ. App.—Texarkana 1974, no writ); Gause v. Gause, 430 S.W.2d 409, 417 (Tex. Civ. App.—Austin 1968, no writ); Leggio v. Bradley Land & Dev. Co., 398 S.W.2d 335, 337 (Tex. Civ. App.—Eastland 1965, no writ); *cf.* Baten v. Smart, 295 S.W.2d 521, 528 (Tex. Civ. App.—Beaumont 1956, writ ref'd n.r.e.).

403. Gause v. Gause, 430 S.W.2d 409, 417 (Tex. Civ. App.—Austin 1968, no writ); West Lumber Co. v. Chessher, 146 S.W. 976, 980 (Tex. Civ. App.—Galveston 1912, writ ref'd).

404. Dorn v. Dunham, 24 Tex. 366, 380 (1859); *cf.* Gulf Prod. Co. v. Baton, 108 S.W.2d 960, 966 (Tex. Civ. App.—Texarkana 1937, writ ref'd).

The question of good faith is one for the jury,[405] and its existence is governed by an objective test of reasonable standards applicable to the facts of each case.[406]

Producer's Lumber & Supply Co. v. Olney Building Co.[407] exemplifies the possible abrogation of the good faith status of an improver. The defendant improver, apparently frustrated by a failure to reach a settlement with the landowner, entered the property and destroyed the improvement he had constructed. The court held the improver liable for waste.[408] The improver, although he had constructed in good faith, had destroyed property legally belonging to the landowner. He could not be considered a good faith improver until he had established his good faith in court; in taking the law into his own hands by destroying the landowner's property, he had abrogated his good faith standing. The court's ruling was fair in that the law should not allow a party to determine his own status as an improver. It is the court's sanction that allows recovery for improvements, not the personal decision of the improver.

The burden of proof in a suit of this nature rests on the improver,[409] and the rules of evidence applicable to civil actions govern.[410] The improver must show, by a preponderance of the evidence, possession, good faith, and the value of the improvements. The improver's pleadings must be succinct and clear so as to provide a basis for recovery.[411] To determine the market value of the improvements, the plaintiff must prove the value of the land both before and after the making of the improvements.[412] Thus, in pleading under article 7393 the descrip-

405. House v. Stone, 64 Tex. 677, 683 (1885).

406. Cahill v. Benson, 46 S.W. 888, 895 (Tex. Civ. App. 1898, writ ref'd).

407. 333 S.W.2d 619 (Tex. Civ. App.—San Antonio 1960, writ ref'd n.r.e.).

408. The improvements, once built, are considered the landowner's real property. The improver does not obtain any right of title in the improvements by the mere construction of them. His interest is only one of compensation for their value. Thus, where the improver exercises dominion over the improvements without first establishing his legal rights in court, he is in the wrong. In the instant case, his wrongful destruction of the improvements was waste. *Id.* at 624.

409. Frierson v. Modern Mut. Health & Accident Ins. Co., 172 S.W.2d 389, 394 (Tex. Civ. App.—Waco 1943, writ ref'd w.o.m.).

410. *See* Busbice v. Hunt, 430 S.W.2d 291, 293 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.); D.T. Carroll Corp. v. Carroll, 256 S.W.2d 429, 432 (Tex. Civ. App.—San Antonio 1953, writ ref'd n.r.e.). *See generally* 56 TEX. JUR. 2d *Trespass to Try Title* § 116 (1964).

411. Burton v. Bell, 380 S.W.2d 561, 567 (Tex. 1964); Lindsay v. Clayman, 151 Tex. 593, 600, 254 S.W.2d 777, 781 (1952); Morrow v. Preston, 209 S.W. 270, 271 (Tex. Civ. App.—Texarkana 1919, no writ); Campbell v. McCaleb, 99 S.W. 129, 131 (Tex. Civ. App. 1907, no writ).

412. Lindsay v. Clayman, 151 Tex. 593, 600, 254 S.W.2d 777, 781 (1952); Frierson

tion of the improvements, the estimate of their value, and the description of the land are interrelated; the pleadings establish the improver's measure of recovery. Accuracy is, therefore, imperative.[413]

The relevant issues in a suit concerning improvements have been determined by statute.[414] The court or jury is to determine: 1) the value of the improvements, not to exceed the amount by which the improvements enhance the land; 2) the value of use and occupation, apart from the improvements, during the improver's possession, plus any damages for waste; 3) the value of the premises recovered without the improvements.[415]

Compensation is based on the benefit to the owner rather than on the cost to the improver, and it is measured by the amount by which the value of the land is enhanced by the improvements.[416] The landowner's right to set-off his damages and rents against the improver's recovery for enhancement is provided by statute to promote an equitable disposition of the suit.[417] Upon determination of the value of both claims, any excess will be awarded to the appropriate party.[418] There will be no compensation for improvements where the landowner's set-off equals the value of the improvements.[419] Alternatively, the good faith improver may be allowed to remove his improvements if this can be done without harm to the land.[420]

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v. Modern Mut. Health & Accident Ins. Co., 172 S.W.2d 389, 394 (Tex. Civ. App.—Waco 1943, writ ref'd w.o.m.); Sheffield v. Mayer, 229 S.W. 614, 615 (Tex. Civ. App.—Texarkana 1921, no writ); *cf.* Harris v. Royal, 446 S.W.2d 351, 352 (Tex. Civ. App.—Waco 1969, writ ref'd n.r.e.).

413. Lindsay v. Clayman, 151 Tex. 593, 600, 254 S.W.2d 777, 781 (1952); Illies v. Frerichs, 32 S.W. 915, 917 (Tex. Civ. App. 1895, no writ).

414. TEX. REV. CIV. STAT. ANN. art. 7394 (1960).

415. *Id.*

416. TEX. REV. CIV. STAT. ANN. arts. 7394, 7395, 7396 (1960).

417. TEX. REV. CIV. STAT. ANN. art. 7395 (1960); TEX. R. CIV. P. 806; *cf.* Cahill v. Benson, 46 S.W. 888, 895 (Tex. Civ. App. 1898, writ ref'd) (Where the land is in the wild, and it is worthless except for the improvements, the titleholder is not allowed to set-off for rental value).

418. TEX. REV. CIV. STAT. ANN. art. 7396 (1960).

419. Allen v. Draper, 204 S.W. 792, 794 (Tex. Civ. App.—San Antonio 1918), *rev'd on other grounds*, 254 S.W. 783 (Tex. Comm'n App. 1923, jdgmt adopted); Meurin v. Kopplin, 100 S.W. 984, 986 (Tex. Civ. App. 1907, no writ).

420. TEX. REV. CIV. STAT. ANN. art. 7401a (Supp. 1974); *see* Producers Lumber & Supply Co. v. Olney Bldg. Co., 333 S.W.2d 619, 624 (Tex. Civ. App.—San Antonio 1960, writ ref'd n.r.e.); Christopher v. Garrett, 292 S.W.2d 926, 933 (Tex. Civ. App.—Texarkana 1956, writ ref'd n.r.e.) (in default of compensation by the landowner the improver may remove his improvements); Salazar v. Garcia, 232 S.W.2d 685, 689 (Tex. Civ. App.—San Antonio 1950, writ ref'd); *cf.* Eubank v. Twin Mountain Oil Corp., 406 S.W.2d 789, 792 (Tex. Civ. App.—Eastland 1966, writ ref'd n.r.e.) (an oil and gas lessee cannot recover his improvements where removal would destroy existing wells; he must settle for compensation); Baten v. Smart, 295 S.W.2d 521, 525, 527 (Tex. Civ.

Upon final judgment, the owner must pay any excess, as determined by the above balancing process, to the improver before he is entitled to take possession of the land.[421] If the owner does not tender the excess within the period of 1 year, the improver has the right to purchase the land in question, less the value of his improvements, within 6 months after the expiration of the year.[422] Payment by the improver to the landowner is conclusive on the issue of title.[423] If the improver fails to exercise his right to purchase, the owner's right to possession again arises, and he will be allowed to recover the land after paying for the improvements.[424] These provisions allow for an equitable settlement of any controversy between the landowner and improver. By affording the improver compensation for his improvements or the opportunity to purchase the land, the law attempts to "make whole" the improver while not damaging the complying landowner. Practically, compensation to the improver is his primary remedy, and it may be enforced by allowing him a lien to secure payment.[425] The opportunity to purchase the land is secondary, arising from the landowner's refusal or inability to pay. But where either of these remedies proves inadequate, the courts are not at a loss to order other appropriate relief.[426]

The most general distinction between a suit to quiet title and a suit in trespass to try title is that the actions are equitable and legal, respectively.[427] Technically, while a suit to quiet title provides relief to one in possession by removing or preventing clouds on his title,[428] a suit

App.—Beaumont 1956, writ ref'd n.r.e.) (removal allowed where the builder never intended the building to become affixed).

421. TEX. REV. CIV. STAT. ANN. art. 7397 (1960); TEX. R. CIV. P. 807; Fain v. McCain, 199 S.W. 889, 890 (Tex. Civ. App.—El Paso 1917, writ ref'd).

422. TEX. REV. CIV. STAT. ANN. art. 7398 (1960).

423. *Id.*

424. TEX. REV. CIV. STAT. ANN. art. 7399 (1960).

425. Producers Lumber & Supply Co. v. Olney Bldg. Co., 333 S.W.2d 619, 624 (Tex. Civ. App.—San Antonio 1960, writ ref'd n.r.e.).

426. Producers Lumber & Supply Co. v. Olney Bldg. Co., 333 S.W.2d 619, 624 (Tex. Civ. App.—San Antonio 1960, writ ref'd n.r.e.) propounded five procedures of relief upon judgment for the improver:

a) removal of the improvement
b) award of the enhanced value of the land after the improvement
c) purchase by the improver of the land
d) a judicial sale of the property dividing the profits of the sale proportionately
e) award of the enhanced value of the land secured by a lien in favor of the improver.

427. *See* Standard Oil Co. v. Marshall, 265 F.2d 46, 50 (5th Cir.), *cert. denied*, 361 U.S. 915 (1959); Haskins v. Wallet, 63 Tex. 213, 218 (1885).

428. Thomson v. Locke, 66 Tex. 383, 388, 1 S.W. 112, 115 (1886); Texas Land & Mortgage Co. v. Worsham, 23 S.W. 938, 940 (Tex. Civ. App. 1893, no writ).

in trespass to try title is a possessory remedy which determines title through recovery of land by one entitled to it by right of superior title.[429]

SUIT TO QUIET TITLE

In order to quiet or remove a cloud on title, the claimant must base his action on the strength of his own title.[430] A fee simple title is not required,[431] and either legal or equitable titles will support a cause of action.[432] Additionally, adverse possession which satisfies the statutory requirements will allow the possessor to quiet title in himself.[433]

A suit to quiet title requires the allegation of an adverse claim. The gravity of that claim must be sufficient to place the property owner into the position that if such claim is asserted, it may cast a cloud upon his enjoyment of the property.[434] The claim may be, for example, an oil and gas lease[435] or a trust deed creating a lien,[436] but any claim or instrument is adverse if it might cast a cloud on the title. In this respect, it may be said that

> [a]ny deed, contract, judgment or other instrument not void on its face which purports to convey any interest in or makes any charge upon the land of a true owner, the invalidity of which would require proof, is a cloud upon the legal title of the owner.[437]

Proceedings in queting title are within the jurisdiction of the district

429. Standard Oil Co. v. Marshall, 265 F.2d 46, 50 (5th Cir.), *cert. denied*, 361 U.S. 915 (1959).

430. Humble Oil & Ref. Co. v. Sun Oil Co., 191 F.2d 705, 716 (5th Cir. 1951), *cert. denied*, 342 U.S. 920 (1952); Lee v. Grupe, 223 S.W.2d 548, 551 (Tex. Civ. App.—Texarkana 1949, no writ).

431. Dalton v. Davis, 1 S.W.2d 571, 572 (Tex. Comm'n App. 1928, holding approved); *see* Humble Oil & Ref. Co. v. Sun Oil Co., 191 F.2d 705, 718 (5th Cir. 1951), *cert. denied*, 342 U.S. 920 (1952); James v. Eagle Rock Ranch, 304 S.W.2d 471, 476 (Tex. Civ. App.—Austin 1957, no writ); Masterson v. Pullen, 207 S.W. 537, 538 (Tex. Civ. App.—San Antonio 1918, no writ); *cf.* Cozart v. Crenshaw, 299 S.W. 499, 504 (Tex. Civ. App.—Fort Worth 1927, no writ).

432. Ojeda v. Ojeda, 461 S.W.2d 487, 488 (Tex. Civ. App.—Austin 1970, writ ref'd n.r.e.); *see* Thomson v. Locke, 66 Tex. 383, 389, 1 S.W. 112, 115 (1886).

433. Moody v. Holcomb, 26 Tex. 714, 719 (1863).

434. Mauro v. Lavlies, 386 S.W.2d 825, 827 (Tex. Civ. App.—Beaumont 1964, no writ); Texan Dev. Co. v. Hodges, 237 S.W.2d 436, 439 (Tex. Civ. App.—Amarillo 1951, no writ).

435. McCurdy v. Morgan, 252 S.W.2d 264, 266 (Tex. Civ. App.—San Antonio 1952, no writ); *cf.* Cozart v. Crenshaw, 299 S.W. 499, 504 (Tex. Civ. App.—Forth Worth 1927, no writ).

436. Temple Trust Co. v. Logan, 82 S.W.2d 1017, 1019 (Tex. Civ. App.—Amarillo 1935, no writ); *accord*, Degetau v. Mayer, 145 S.W. 1054, 1057 (Tex. Civ. App.—San Antonio 1912, writ ref'd).

437. Best Inv. & Co. v. Parkhill, 429 S.W.2d 531, 534 (Tex. Civ. App.—Corpus Christi 1968, no writ).

court.[438] Venue lies in the county where the property is located,[439] and the suit is in rem.[440] The only parties necessary to the action are the plaintiff and the person who has asserted a claim,[441] but any party directly interested may intervene.[442] Although the action to quiet title is founded in equity, Texas has enacted statutory provisions which apply if the suit involves a non-resident.[443] These statutes afford the plaintiff a cause of action against the non-resident, the defendant of unknown residency, and the transient who asserts an adverse claim, allowing service by publication.[444] There has been a problem in the application of articles 1975-76[445] concerning whether their provision for service by publication applies to suits both to quiet title and to try title.[446] It appears that the statute refers only to quiet title suits because the laws of Texas provided for citation by publication in the trespass to try title suit before article 1975 was enacted.[447] Moreover, judicial references to the statute also indicate that it has been generally applied to the suit to quiet title.[448]

Aside from article 1975, Texas recognizes a general quiet title suit as to real property conflicts concerning resident parties.[449] The peti-

438. TEX. CONST. art. V, § 8.

439. TEX. REV. CIV. STAT. ANN. art. 1995(14) (1964); Lott v. Fields, 236 S.W.2d 878, 879 (Tex. Civ. App.—San Antonio 1951, mand. overr.); *see* Gritzman v. Hatfield, 439 S.W.2d 468, 469 (Tex. Civ. App.—Dallas 1969, no writ).

440. Sloan v. Thompson, 23 S.W. 613, 615 (Tex. Civ. App. 1893, no writ); *cf.* Aldridge v. Universal C.I.T. Credit Corp., 290 S.W.2d 398, 400 (Tex. Civ. App.—El Paso 1956, writ ref'd n.r.e.).

441. Pickett v. Roberts, 467 S.W.2d 244, 246 (Tex. Civ. App.—Eastland 1971, writ ref'd n.r.e.); *accord*, Outlaw v. Bowen, 285 S.W.2d 280, 284 (Tex. Civ. App.—Amarillo 1955, writ ref'd n.r.e.).

442. Shirey v. Trust Co., 69 S.W.2d 835, 837 (Tex. Civ. App.—Texarkana 1934, writ ref'd).

443. TEX. REV. CIV. STAT. ANN. arts. 1975, 1976 (1964); TEX. R. CIV. P. 810, 811, 812, 813.

444. TEX. REV. CIV. STAT. ANN. arts. 1975, 1976 (1964).

445. TEX. REV. CIV. STAT. ANN. arts. 1975, 1976 (1964).

446. Cates v. Alston's Heirs, 61 S.W. 979, 980 (Tex. Civ. App. 1901, writ ref'd); Wilford, *Judgments of Texas Courts Respecting Real Estate Titles*, 15 TEXAS L. REV. 41, 54-56 (1937); *see* 47 TEX. JUR. 2d *Quieting Title* at 559 (1964) (where the statute is discussed as an additional proceeding to quiet title). *But see* 56 TEX. JUR. 2d *Trespass to Try Title* at 307 (1964) (where the statute is discussed generally as another title action).

447. *See* Phillips v. Moore, 100 U.S. 208, 212 (1879); TEX. CIV. STAT. art. 4804 (1879) (corresponds to TEX. R. CIV. P. 800); Wilford, *Judgments of Texas Courts Respecting Real Estate Titles*, 15 TEXAS L. REV. 41, 54-56 (1937).

448. Pickett v. Roberts 467 S.W.2d 244, 245 (Tex. Civ. App.—Eastland 1971, writ ref'd n.r.e.); Knox v. Quinn, 164 S.W.2d 580, 581 (Tex. Civ. App.—Austin 1942, no writ). *But see* Harper v. Allen, 38 S.W.2d 146, 148 (Tex. Civ. App.—San Antonio 1931, writ dism'd).

449. *E.g.*, Humble Oil & Ref. Co. v. Sun Oil Co., 191 F.2d 705 (5th Cir.), *cert. de-*

tion in such cases follows the general requisites of civil pleading, but usually entails

a) a description of the property,
b) the petitioner's right, title, or ownership in the property,
c) a description of the cloud cast by the defendant, and
d) the grounds rendering defendant's claim invalid.[450]

The defendant's answer may set forth facts alleging a defense or he may disclaim any interest to the property in question.[451] If a cross-action is filed, it will be treated as an original petition.[452]

The burden of proof is on the plaintiff throughout the trial;[453] he must prove both superior title[454] and the wrongful cloud on that title.[455] Failure to sustain this burden will result in judgment for the defendant.[456] The general rules of materiality and admissibility control the introduction of evidence.[457] Upon a showing of superior title and a wrongful claim against that title, the petitioner establishes a prima facie case, and the burden of going forward with the evidence will shift to the defendant.[458]

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nied, 342 U.S. 920 (1952); Ojeda v. Ojeda, 461 S.W.2d 487, 488 (Tex. Civ. App.—Austin 1970, writ ref'd n.r.e.).

450. 11 TEX. JUR. FORMS 209, *Quieting Title* § 209:11 (2d ed. 1974); *e.g.*, Sanchez v. Carey, 409 S.W.2d 458, 460-61 (Tex. Civ. App.—Corpus Christi 1966, no writ); Texan Dev. Co. v. Hodges, 237 S.W.2d 436 (Tex. Civ. App.—Amarillo 1951, no writ); City of Dublin v. Tatum, 232 S.W.2d 740, 741-42 (Tex. Civ. App.—Eastland 1950, no writ); Lee v. Grupe, 223 S.W.2d 548, 551 (Tex. Civ. App.—Texarkana 1949, no writ); *see* Johnson v. Miller, 173 S.W.2d 280, 283 (Tex. Civ. App.—Galveston 1943), *aff'd*, 142 Tex. 228, 177 S.W.2d 249 (1944) (one need not allege that defendant is in possession); Heath v. First Nat'l Bank, 32 S.W. 778, 779 (Tex. Civ. App. 1895, no writ) (insufficient pleading).

451. White Point Oil & Gas Co. v. Dunn, 18 S.W.2d 267, 272 (Tex. Civ. App.—San Antonio 1929, writ dism'd); *see* Rains v. Thornton, 286 S.W.2d 174, 178 (Tex. Civ. App.—Fort Worth 1955), *rev'd on other grounds*, 157 Tex. 65, 299 S.W.2d 287 (1957).

452. Degetau v. Mayer, 145 S.W. 1054, 1057 (Tex. Civ. App.—San Antonio 1912, writ ref'd).

453. Ellison v. Butler, 443 S.W.2d 886, 889 (Tex. Civ. App.—Corpus Christi 1969, no writ). Routte v. Guarino, 216 S.W.2d 607, 610 (Tex. Civ. App.—Galveston 1948, writ ref'd n.r.e.).

454. Rains v. Thornton, 286 S.W.2d 174, 178 (Tex. Civ. App.—Fort Worth 1955), *rev'd on other grounds*, 157 Tex. 65, 299 S.W.2d 287 (1957); White v. Jones, 158 S.W.2d 842 (Tex. Civ. App.—Texarkana 1942, no writ).

455. Lee v. Grupe, 223 S.W.2d 548, 551 (Tex. Civ. App.—Texarkana 1949, no writ); Neel v. Maurice, 223 S.W.2d 690, 693 (Tex. Civ. App.—El Paso 1941, no writ).

456. McGuire v. Bond, 271 S.W.2d 508, 511 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.).

457. Eason v. David, 232 S.W.2d 427, 433 (Tex. Civ. App.—Beaumont 1950, writ ref'd n.r.e.).

458. Rains v. Thornton, 286 S.W.2d 174, 177 (Tex. Civ. App.—Fort Worth 1955), *rev'd on other grounds*, 157 Tex. 65, 299 S.W.2d 287 (1957).

The defenses applicable to the quiet title suit are those of the other land recovery actions.[459] The statute of limitations or laches is often pleaded, but never successfully.[460] To the holder of the superior title, an adverse claim is a continually arising conflict, continually clouding his title. So long as the cloud exists, the cause of action for its removal exists.

In seeking reparation for the defendant's actions, the plaintiff has a variety of possible remedies. The decree vesting title, whereby title is "quieted" in him, is the primary relief afforded the injured party.[461] In addition to the vesting of title, damages may be recovered but only upon special pleadings.[462] Even though the claimant may recover possession,[463] this relief would seem to fall more often logically within the parameters of the trespass to try title suit.[464] Article 4642(4) allows injunctive relief,[465] and because the suit to quiet title is one in equity, it upholds this right.[466]

Judgment is awarded according to pleadings and proof. It is basically a decree fixing title,[467] but will encompass all issues raised and supported, including the removal of a cloud,[468] disposition of funds

459. *Compare* White Point Oil & Gas Co. v. Dunn, 18 S.W.2d 267, 268 (Tex. Civ. App.—San Antonio 1929, writ dism'd); Milmo Nat'l Bank v. Convery, 49 S.W. 926, 927 (Tex. Civ. App. 1899, writ ref'd) *with* Tanton v. State Nat'l Bank, 43 S.W.2d 957, 963 (Tex. Civ. App.—El Paso 1931), *aff'd on other grounds*, 125 Tex. 16, 79 S.W.2d 833 (1935); Williams v. Humble Oil & Ref. Co., 139 S.W.2d 346, 349 (Tex. Civ. App.—El Paso 1940, writ dism'd jdgmt cor.). *See generally* Rains v. Thornton, 286 S.W.2d 174, 178 (Tex. Civ. App.—Fort Worth 1955), *rev'd on other grounds*, 157 Tex. 65, 299 S.W.2d 287 (1957).

460. Watson v. Rochmill, 137 Tex. 565, 569, 155 S.W.2d 783, 785 (1941); Outlaw v. Bowen, 285 S.W.2d 280, 284 (Tex. Civ. App.—Amarillo 1955, writ ref'd n.r.e.); Franzetti v. Franzetti, 120 S.W.2d 123, 126 (Tex. Civ. App.—Austin 1938, no writ).

461. City of Dublin v. Tatum, 232 S.W.2d 740, 741-42 (Tex. Civ. App.—Eastland 1950, no writ); *see* Ball v. Filba, 153 S.W. 685, 686 (Tex. Civ. App.—Austin 1913, writ ref'd).

462. McCollum Exploration Co. v. Reaugh, 146 S.W.2d 1109, 1110 (Tex. Civ. App. —San Antonio 1940), *aff'd*, 139 Tex. 485, 163 S.W.2d 620 (1942); *cf.* Kidd v. Hoggett, 331 S.W.2d 515, 518 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.).

463. *See* West Tex. Dist. Baptist Church Ass'n v. Pilgrim Rest Baptist Church, 368 S.W.2d 814, 815, 816 (Tex. Civ. App.—Fort Worth 1963, writ ref'd n.r.e.).

464. *See* Standard Oil Co. v. Marshall, 265 F.2d 46, 50 (5th Cir.), *cert. denied*, 361 U.S. 915 (1959); Hays v. Texas & Pac. Ry., 62 Tex. 397, 399 (1884).

465. TEX. REV. CIV. STAT. ANN. art. 4642, § 4 (1952).

466. Humble Oil & Ref. Co. v. Sun Oil Co., 191 F.2d 705, 719 (5th Cir. 1951), *cert. denied*, 342 U.S. 920 (1952); Phelan v. Phelan, 471 S.W.2d 605, 610 (Tex. Civ. App.—Beaumont 1971, no writ); Texan Dev. Co. v. Hodges, 237 S.W.2d 436, 439 (Tex. Civ. App.—Amarillo 1951, no writ).

467. City of Dublin v. Tatum, 232 S.W.2d 740, 741-42 (Tex. Civ. App.—Eastland 1950, no writ); *see* Ball v. Filba, 153 S.W. 685, 686 (Tex. Civ. App.—Austin 1913, writ ref'd).

468. White Point Oil & Gas Co. v. Dunn, 18 S.W.2d 267, 272 (Tex. Civ. App.—San Antonio 1929, writ dism'd).

claimed by the opposing parties,[469] or compensation for the loss of improvements.[470]

TRESPASS TO TRY TITLE

Trespass to try title is an action to recover the possession of land unlawfully withheld from an owner who has a right of immediate possession.[471] In order to gain possession, the rightful owner must have sufficient title to the property in question;[472] therefore, the action is determinative on the issue of title. Article 7364 reads:

> All fictitious proceedings in the action of ejectment are abolished. The method of trying titles to lands, tenements or other real property shall be by action of trespass to try title.[473]

In this action, no other principle is more pervasive than that which requires the plaintiff to recover on the strength of his own title; proof that the defendant has no title is insufficient for recovery.[474] To hold otherwise would cause instability in title, for proof that defendant has no title does not establish that plaintiff has title. Recovery is provided for that party who has superior right to possession, and only that party can displace the defendant. A sufficient title may be either legal or equitable;[475] a fee simple is not a prerequisite.[476] The plaintiff may recover on a record title, on the contention of prior possession, or on a claim of title by limitation.[477]

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469. *Id.* at 272.

470. Eubank v. Twin Mountain Oil Corp., 406 S.W.2d 789, 792 (Tex. Civ. App.—Eastland 1966, writ ref'd n.r.e.).

471. Standard Oil Co. v. Marshall, 265 F.2d 46, 50 (5th Cir.), *cert. denied*, 361 U.S. 915 (1959); Hays v. Texas & Pac. Ry., 62 Tex. 397, 399 (1884). *Contra*, Green v. City of San Antonio, 282 S.W.2d 769, 772 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.). This contradiction is explained in Hollan v. State, 308 S.W.2d 122, 125 (Tex. Civ. App.—Fort Worth 1957, writ ref'd n.r.e.).

472. TEX. REV. CIV. STAT. ANN. art. 7375 (1960).

473. TEX. REV. CIV. STAT. ANN. art. 7364 (1960).

474. *E.g.*, United States v. 115.27 Acres of Land, 471 F.2d 1287, 1289 (5th Cir. 1973); Halbert v. Green, 156 Tex. 223, 229, 293 S.W.2d 848, 852 (1956); Reinhardt v. North, 507 S.W.2d 589, 591 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.).

475. Texas W. Fin. Corp. v. Cochran, 488 S.W.2d 957, 958 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.); Biggs v. Poling, 134 S.W.2d 801, 806 (Tex. Civ. App.—Amarillo 1939, writ dism'd jdgmt cor.).

476. Milner v. Whatley, 282 S.W.2d 903, 908-909 (Tex. Civ. App.—Eastland 1955, writ ref'd n.r.e.); Watkins v. Certain-Teed Prod. Corp., 231 S.W.2d 981, 984 (Tex. Civ. App.—Amarillo 1950, no writ).

477. Moody v. Holcomb, 26 Tex. 714, 719 (1863); Reinhardt v. North, 507 S.W.2d 589, 591 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.); State v. Noser, 422 S.W.2d 594, 599 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.); Dinwitty v. McLemore, 291 S.W.2d 448, 451 (Tex. Civ. App.—Dallas 1956, no writ); Barry v. Jones, 219 S.W. 1113 (Tex. Civ. App.—Texarkana 1920, no writ). A petitioner must proceed to

In an action of trespass to try title, if the plaintiff resorts to proof of record title, he is required to trace his title from the sovereign to himself or to a point of common source with the defendant.[478] Upon tracing title to a common source, he then is required to prove superior title in himself.[479] The burden of proof is on the plaintiff to establish a common source,[480] and this may be done by the pleadings, by agreement between the parties, or by proof at the trial.[481] A deed is sufficient to establish a point of common source of title.[482] Also, where one party claims title by conveyance from a certain source, and the other party claims adverse possession against that same source, a common point is established.[483] The efficacy of proving a common source of title lies in the abbreviated task of proving title, for once title is proven in a common source it is unnecessary to trace the title back to the sovereign.[484] Once a common source has been established, a rebuttable presumpton arises that the common source held title of all previous owners.[485] In order to rebut this presumption, the party must show that title never vested in the common source.[486] The mere proof of anterior title in a third party is insufficient, for it is not conclusive

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trial on the title he has pleaded. Evidence of an after-acquired title is inadmissiblbe unless supported by an amended pleading. Ballard v. Carmichael, 83 Tex. 355, 359, 18 S.W. 734, 735 (1892); Gholson v. Peeks, 224 S.W.2d 778, 782 (Tex. Civ. App.—Eastland 1949, writ ref'd).

478. Roberts v. Fraser, 399 S.W.2d 211 (Tex. Civ. App.—Beaumont 1966, writ dism'd).

479. State v. Noser, 422 S.W.2d 594, 599 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.); Scott v. Scott, 347 S.W.2d 288, 289 (Tex. Civ. App.—Waco 1961, writ ref'd n.r.e.); Temple Lumber Co. v. Arnold, 14 S.W.2d 926, 928 (Tex. Civ. App.—Beaumont 1929, writ dism'd); Barry v. Jones, 219 S.W. 1113 (Tex. Civ. App.—Texarkana 1920, no writ).

480. Green v. City of San Antonio, 282 S.W.2d 769, 772 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.).

481. State v. Noser, 422 S.W.2d 594, 600 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.); Moran v. Stanolind Oil & Gas Co., 127 S.W.2d 1012, 1016 (Tex. Civ. App.—Fort Worth 1939, writ dism'd jdgmt cor.); Luckel v. Sessums, 71 S.W.2d 579, 580 (Tex. Civ. App.—Texarkana 1934, writ dism'd). In essence, opposing parties uniformly agree to a common source, but this does not preclude proof of another superior title. Ledbetter, *Preparation and Trial of Suits for Land*, 12 TEX. B.J. 155, 178 (1949).

482. Burns v. Goff, 79 Tex. 236, 14 S.W. 1009, 1010 (1891); Patterson v. Metzing, 424 S.W.2d 255, 258 (Tex. Civ. App.—Corpus Christi 1967, no writ).

483. Moran v. Stanolind Oil & Gas Co., 127 S.W.2d 1012, 1016 (Tex. Civ. App.—Fort Worth 1939, writ dism'd jdgmt cor.).

484. State v. Noser, 422 S.W.2d 594, 600 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.); *cf.* Green v. City of San Antonio, 282 S.W.2d 769, 774 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.).

485. McBride v. Loomis, 212 S.W. 480, 481 (Tex. Comm'n App. 1919, jdgmt adopted); Universal Home Builders, Inc. v. Farmer, 375 S.W.2d 737, 741 (Tex. Civ. App.—Tyler 1964, no writ); Krasa v. Derrico, 193 S.W.2d 891, 893 (Tex. Civ. App.—San Antonio 1946, no writ).

486. Rice v. St. Louis, Ark. & Tex. Ry., 87 Tex. 90, 93, 26 S.W. 1047, 1048 (1894).

of the fact that the title was not in the possession of the common source at the time of the grant.[487]

Once plaintiff proves a common source from which both he and defendant deraign title, and he proves superior title in himself, he establishes a prima facie case.[488] Rule 798 of the Texas Rules of Civil Procedure explains that the plaintiff's proof of a common source may not be used by the defendant without the introduction of such evidence in his own behalf,[489] but case law provides certain distinctions.[490] Rationalizing this rule, it appears that if the plaintiff's common source evidence establishes superior title in himself, then the defendant must introduce evidence of his own superior title, which would entail deraignment from the common source. The defendant becomes the actor, and he must rely on proof of title in himself, not defective title in his opponent. Where plaintiff's common source evidence establishes superior title in the defendant, the courts will not require the defendant to prove what is already established.[491]

If neither claimant relies on either a record title or limitation title,[492] the party who has had prior possession of the property obtains a rebuttable presumption that he has the better right.[493] Sufficient rebuttal of this presumption must include evidence that the defendant is in possession of superior title.[494] The defense of title in a third party by a

487. *Id.* at 93, 26 S.W.2d at 1048.

488. French v. May, 484 S.W.2d 420, 427 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.); Hortenstine v. McKlemurry, 425 S.W.2d 691, 693 (Tex. Civ. App.—Eastland 1968, writ ref'd n.r.e.); Graham v. Hubbard, 406 S.W.2d 747, 748 (Tex. Civ. App.—Beaumont 1966, no writ); Abram v. Southeastern Fund, 404 S.W.2d 673, 676 (Tex. Civ. App.—Tyler 1966, writ ref'd n.r.e.); Universal Home Builders, Inc. v. Farmer, 375 S.W.2d 737, 741 (Tex. Civ. App.—Tyler 1964, no writ).

489. TEX. R. CIV. P. 798.

490. Hovel v. Kaufman, 266 S.W. 858, 861 (Tex. Civ. App.—San Antonio 1924), *aff'd*, 280 S.W. 185 (Tex. Comm'n App. 1926, opinion adopted); Abram v. Southeastern Fund, 404 S.W.2d 673, 676 (Tex. Civ. App.—Tyler 1966, writ ref'd n.r.e.). These decisions allowed the defendant to apply the petitioner's common source evidence wherein proving common source the petitioner also proved a superior title in the defendant. The decisions turned not on Rule 798 but on the failure of the petitioner to prove superior title.

491. Hovel v. Kaufman, 266 S.W. 858, 861 (Tex. Civ. App.—San Antonio 1924), *aff'd*, 280 S.W. 185 (Tex. Comm'n App. 1926, opinion adopted).

492. Moody v. Holcomb, 26 Tex. 714, 718-19 (1863); Champion Paper & Fibre Co. v. Wooding, 321 S.W.2d 127, 136 (Tex. Civ. App.—Waco 1959, writ ref'd n.r.e.).

493. Decuir v. Houseman, 310 S.W.2d 591, 593 (Tex. Civ. App.—Beaumont 1958, writ ref'd n.r.e.); Dinwitty v. McLemore, 291 S.W.2d 448, 451 (Tex. Civ. App.—Dallas 1956, no writ); Ballingall v. Brown, 226 S.W.2d 165, 171 (Tex. Civ. App.—Fort Worth 1949, writ ref'd n.r.e.); *see* Comment, *Prior Possession In Trespass To Try Title Suits*, 12 BAYLOR L. REV. 427 (1960).

494. Reiter v. Coastal States Gas Prod. Co., 382 S.W.2d 243, 250-51 (Tex. 1964).

defendant trespasser is insufficient to rebut title by prior possession.[495] To hold otherwise would allow any trespasser to displace the prior possessor of the land merely by showing no title in the prior possessor. Without proof of superior title in himself, and with only the claim of prior possession, the displaced plaintiff would be unable to regain possession; and the trespasser would be under no obligation to prove title in himself in order to retain possession.[496] The instability of title in such a situation is obvious, for the trespasser would be subject to the same action by a subsequent trespasser. The present law anticipates this problem by holding that prior possession is superior title against the trespasser, and that it remains superior until the defendant proves title in himself.[497]

Adverse possession has been recognized as a foundation on which to base a suit in trespass to try title.[498] A plaintiff in possession for the statutory length of time[499] stands on equal footing with the holder of any record title, and his position will be acknowledged by the courts.[500]

The procedural requisites of the trespass to try title suit are provided by the Texas Rules of Civil Procedure.[501] Formal pleadings are required and, aside from several practices unique to this action, the gen-

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495. *Id.* at 250-51.

496. Potts v. Potts, 354 S.W.2d 624, 628 (Tex. Civ. App.—Dallas 1962, no writ); Jackson v. Griffin, 302 S.W.2d 266, 267 (Tex. Civ. App.—Waco 1957, no writ).

497. Reiter v. Coastal States Gas Prod. Co., 382 S.W.2d 243, 250-51 (Tex. 1964). Up until 1964 the question of prior possession was in a state of conflict. The supreme court seemed to have ruled irreconcilably in two previous cases. Lund v. Doyno, 127 Tex. 19, 20, 91 S.W.2d 315, 316 (1936) (allowing the defendant trespasser to oust the prior possessor without proof of title in himself); House v. Reavis, 89 Tex. 626, 631, 35 S.W. 1063, 1065 (1896) (protecting the prior possessor against the defendant trespasser). The supreme court did not answer the conflict in Land v. Turner, 377 S.W.2d 181 (Tex. 1964), but faced the problem later that year in *Reiter*. Acknowledging the two different lines of cases, the supreme court expressly overruled its holding in *Lund* and approved its decision in *House* where the court rationalized that if the defendant trespasser were to prevail then

> the title of every possessor of real estate whose chain of title was not perfect would be placed at the mercy of those who, neither by force, fraud, or strategy, could secure the possession, and thus place the actual and rightful possessor upon proof of a regular chain of title from the government, and, in case of failure to do so, could defeat his right by simply showing that the title had passed out of the state without showing any claim of title in himself.

House v. Reavis, 89 Tex. 626, 632, 35 S.W. 1063, 1065 (1896).

498. Moody v. Holcomb, 26 Tex. 714, 718-19 (1863); Champion Paper & Fibre Co. v. Wooding, 321 S.W.2d 127, 136 (Tex. Civ. App.—Waco 1959, writ ref'd n.r.e.).

499. For the prescribed periods of possession see pp. 78-105 *infra*.

500. Reinhardt v. North, 507 S.W.2d 589, 591 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.).

501. TEX. R. CIV. P. 783-809.

eral rules of civil practice apply.[502] Jurisdiction lies in the district court[503] and the proceeding is in rem,[504] thereby allowing service by publication.[505] As in all suits for the recovery of land, venue lies in the county where the land is located.[506]

To be entitled to recover title, the plaintiff need only have a right to immediate possession of the property.[507] A single tenant in common may be allowed to bring suit for an entire parcel of land without joining his co-tenants.[508] The underlying rationale is that a tenant in common is entitled to the entire parcel, subject only to occupation by his fellow tenants in common. If the suit seeks damages as well as possession, however, then all tenants in common must be joined: each is entitled to his own damages.[509] The defendant is generally the person in possession of the premises,[510] but this is not always true.[511]

The petition in the trespass to try title suit must state:

> a) the petitioner's name; b) a description of the property and its location; c) the petitioner's interest in the property; d) that the petitioner was in possession; e) that he has been ousted; f) the extent of damage, and g) the prayer.[512]

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502. TEX. R. CIV. P. 795. TEX. R. CIV. P. 279 excepts trespass to try title from the general rule requiring affirmative pleading of any issue in order to allow an affirmative submission of such issue in the court's charge.

503. TEX. CONST. art. V, § 8; TEX. REV. CIV. STAT. ANN. art. 1906 (1964).

504. Hardy v. Beaty, 84 Tex. 562, 569, 19 S.W. 778, 780 (1892); *see* Cole v. Lee, 435 S.W.2d 283, 287 (Tex. Civ. App.—Dallas 1968, writ dism'd).

505. Hamilton v. Brown, 161 U.S. 256, 275 (1896).

506. TEX. REV. CIV. STAT. ANN. art. 1995(14) (1964); *see* Tunstill v. Scott, 138 Tex. 425, 432, 160 S.W.2d 65, 69 (1942).

507. Reed v. Turner, 489 S.W.2d 373, 380 (Tex. Civ. App.—Tyler 1972, writ ref'd n.r.e.); Wagers v. Swilley, 220 S.W.2d 673, 677 (Tex. Civ. App.—Galveston 1949, writ ref'd n.r.e.). *But see* Green v. City of San Antonio, 282 S.W.2d 769, 772 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.).

508. Standard Oil Co. v. Marshall, 265 F.2d 46, 52 (5th Cir.), *cert. denied*, 361 U.S. 915 (1959); Hicks v. Southwestern Settlement & Dev. Corp., 188 S.W.2d 915, 919 (Tex. Civ. App.—Beaumont 1945, writ ref'd w.o.m.).

509. Hicks v. Southwestern Settlement & Dev. Corp., 188 S.W.2d 915, 919-22 (Tex. Civ. App.—Beaumont 1945, writ ref'd w.o.m.); *see* Standard Oil Co. v. Marshall, 265 F.2d 46, 50 (5th Cir.), *cert. denied*, 361 U.S. 915 (1959).

510. TEX. R. CIV. P. 784; Giddens v. Williams, 265 S.W.2d 187, 190 (Tex. Civ. App. —Texarkana 1954, writ ref'd n.r.e.); *accord*, Milner v. Whatley, 282 S.W.2d 903, 908-909 (Tex. Civ. App.—Eastland 1955, writ ref'd n.r.e.); *see* TEX. R. CIV. P. 785, 786, 787 (possible joinder of parties).

511. Day Land & Cattle Co. v. State, 68 Tex. 526, 536, 4 S.W. 865, 868 (1887) (in which the supreme court held that the defendant need not be in possession but need only assert an adverse claim); *cf.* Neely v. Neely, 52 S.W.2d 927, 930 (Tex. Civ. App.— Fort Worth 1932, no writ).

512. See TEX. R. CIV. P. 783 for a more detailed explanation of these petition requisites. *See, e.g.*, Marshall v. Garcia, 514 S.W.2d 513, 519 (Tex. Civ. App.—Corpus Christi 1974, no writ); Minyard v. Texas Power & Light Co., 448 S.W.2d 566, 568 (Tex. Civ. App.—Fort Worth 1969, no writ).

It should be noted that a faulty description of the property will render the petition defective because the court will be unable to identify the land in question.[513] Also, it has been held that the omission of an allegation of trespass and ouster does not hinder the petition, possession no longer being a requisite to a cause of action.[514]

"In trespass to try title the plaintiff is not required to plead his title, but, if he does plead it, he is confined to proof of that title . . . ."[515] This is logical in that if a party pleads one title, he impliedly admits that he claims under that title; this avoids surprise to the opposing party.[516] A limitation title must be specifically pleaded.[517] If the plaintiff so pleads, he does not abandon his general allegation,[518] although the special pleading of any other title does result in restriction to proof of that special title.[519] The rationale for allowing the plaintiff to use both allegations stems from the requirement that limitation title must always be specially pleaded, whereas any other title may be proven under the general petition.[520] It is obvious that specially pleading one's title is a limiting procedure that should be avoided wherever possible. Such a practice narrows the plaintiff's scope of proof, and his opportunity for recovery is made more difficult.

While the defendant must answer formally,[521] the trespass to try title suit is unique in that it furnishes him with a plea entitling him to prove

513. Leach v. Cassity, 279 S.W.2d 630, 636 (Tex. Civ. App.—Fort Worth 1955; writ ref'd n.r.e.); Stewart v. Collatt, 111 S.W.2d 1131, 1132 (Tex. Civ. App.—Fort Worth 1937, no writ).

514. Day Land & Cattle Co. v. State, 68 Tex. 526, 536, 4 S.W. 865, 868-69 (1887).

515. National Lumber & Creosoting Co. v. Maris, 151 S.W. 325 (Tex. Civ. App.—San Antonio 1912, writ ref'd); *accord*, City of Houston v. Miller, 436 S.W.2d 368, 372 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.); Rhoades v. Meyer, 418 S.W.2d 300, 301-302 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.); Wagner v. Pulliam, 361 S.W.2d 470, 473 (Tex. Civ. App.—Eastland 1962, no writ).

516. *See* Martinez v. DeBarroso, 189 S.W. 740, 741 (Tex. Civ. App.—San Antonio 1916, writ ref'd).

517. Rhoades v. Meyer, 418 S.W.2d 300, 301 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.); Franzetti v. Franzetti, 124 S.W.2d 195, 198 (Tex. Civ. App.—Austin 1939, writ ref'd).

518. Rhoades v. Meyer, 418 S.W.2d 300, 301-302 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.); McAdams v. Hooks, 104 S.W. 432, 433 (Tex. Civ. App. 1907, no writ).

519. National Lumber & Creosoting Co. v. Maris, 151 S.W. 325 (Tex. Civ. App.—San Antonio 1912, writ ref'd); *accord*, City of Houston v. Miller, 436 S.W.2d 368, 372 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.); Rhoades v. Meyer, 418 S.W.2d 300, 301-302 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.); Wagner v. Pulliam, 361 S.W.2d 470, 473 (Tex. Civ. App.—Eastland 1962, no writ).

520. Hidalgo v. Lechuga, 407 S.W.2d 545, 547-48 (Tex. Civ. App.—El Paso 1966, writ ref'd n.r.e.).

521. Wilson v. King, 148 S.W.2d 442, 443 (Tex. Civ. App.—Fort Worth 1941, no writ).

almost any legal, equitable, or affirmative defense without special pleading.[522] Limitation title is the only defense which must be specially pleaded.[523] Insufficient allegations may prevent the defendant's use of additional defenses where the "not guilty" plea is absent from the pleadings, and thus limits him to the defenses pleaded.[524]

The plea of "not guilty" is construed as an admission by the defendant of the fact of his possession: this rule is followed for the purpose of narrowing the issues of fact.[525] The "not guilty" plea, although it allows the broadest base of defense, is not the exclusive answer open to the defendant. He may file a "not guilty" plea, a general denial, special pleas, or all three.[526] By filing a general denial, the defendant compels the plaintiff to prove title in himself, and the defendant is entitled to any defenses to controvert the plaintiff's proof.[527] The defendant who enters a special plea is held to have waived his plea of "not guilty;"[528] the petitioner still has the burden of proving his own superior title, but the defendant now stands on the same ground as any pleader in a civil proceeding.[529] If the defendant files not only a "not

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522. TEX. R. CIV. P. 788 states:

> The defendant in such action may file only the plea of 'not guilty,' which shall state in substance that he is not guilty of the injury complained of in the petition filed by the plaintiff against him, except that if he claims an allowance for improvements, he shall state the facts entitling him to the same.

TEX. R. CIV. P. 789 states: "Under such plea of 'not guilty' the defendant may give in evidence any lawful defense to the action except the defense of limitations, which shall be specially pleaded." *E.g.*, Johnson v. Byler, 38 Tex. 606, 611 (1873); Ragsdale v. Gohlke, 36 Tex. 286, 288 (1871); Taylor v. Guillory, 439 S.W.2d 362, 365 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ); First State Bank v. Knox, 173 S.W. 894, 898 (Tex. Civ. App.—Fort Worth 1915, no writ).

523. *See* Rhoades v. Meyer, 418 S.W.2d 300, 301-302 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.); Ledbetter, *Preparation and Trial of Suits for Land*, 12 TEX. B.J. 155, 156 (1949).

524. Love v. McGee, 378 S.W.2d 96, 97 (Tex. Civ. App.—Texarkana 1964, writ ref'd n.r.e.).

525. TEX. R. CIV. P. 790; Patterson v. Metzing, 424 S.W.2d 255, 258 (Tex. Civ. App. —Corpus Christi 1967, no writ).

526. Cox v. Olivard, 482 S.W.2d 682, 685 (Tex. Civ. App.—Dallas 1972, no writ); Brinkley v. Brinkley, 381 S.W.2d 725, 727 (Tex. Civ. App.—Houston 1964, no writ).

527. Cox v. Olivard, 482 S.W.2d 682, 685 (Tex. Civ. App.—Dallas 1972, no writ); Brinkley v. Brinkley, 381 S.W.2d 725, 727 (Tex. Civ. App.—Houston 1964, no writ).

528. Koenigheim v. Miles, 67 Tex. 113, 117, 2 S.W. 81, 83 (1886); Evants v. Erdman, 153 S.W. 929, 930 (Tex. Civ. App.—Amarillo 1913, no writ); *see* Taylor v. Guillory, 430 S.W.2d 362, 365 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ); *cf.* Rains v. Thornton, 286 S.W.2d 174, 178 (Tex. Civ. App.—Fort Worth 1955), *rev'd on other grounds*, 157 Tex. 65, 299 S.W.2d 287 (1957).

529. McDonald aptly explains this waiver in his treatise on Texas Civil Practice:

> If the defendant, in addition to his not guilty plea alleges specially his title or other matters which could have been put in issue under the not guilty plea, the pleading becomes subject to the rules applicable to normal civil actions. The not guilty plea is treated merely as general denial which places upon the plaintiff the burden of proving his case and permits the defendant to introduce evidence rebutting the

guilty" plea and special plea, but also a cross-action to settle title in himself, he will not be restricted to evidence under his special plea.[530] The wisdom of refraining from the use of the "not guilty" plea is questionable. The statutes provide it to enable the defendant the use of almost all defenses without the necessity of special pleadings. Avoiding its use by filing a general denial or by specially pleading seems dubious in view of its advantages.

The rules of procedure offer assistance in the parties' preparation for trial and for the subsequent determination of factual issues once trial is in progress. The rules allow the demand of an abstract by either party after the defendant has answered.[531] 'The obvious purpose of such a rule is to enable the party seeking the abstract to examine the documents of the opposing party and, thus to formulate a more informed defense.[532] The rules pertaining to such abstracts appear to be enforced with varying strictness among the courts of civil appeals.[533] The demand for an abstract has no application where a title is specially pleaded, for the special plea furnishes all the desired information that an abstract would reveal.[534] Rules 796 and 797 authorize the trial judge or either party to seek the services of a surveyor to determine the boundary lines in dispute.[535] In early Texas law, the appointment of a surveyor appears to have been compulsory upon application,[536] but it has become a discretionary procedure arising upon motion by either party or of the court's own choice.[537] Such an ap-

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plaintiff's claim. In his affirmative defenses, however, the defendant is limited to those which he has specifically alleged, and loses a substantial part of the issue-raising power of the not-guilty plea.

2 R. McDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS § 7.24.4 (1970).

530. Temple v. City of Coleman, 245 S.W. 264, 267 (Tex. Civ. App.—Austin 1922, writ dism'd); *see* Hurst v. Webster, 252 S.W.2d 793, 794 (Tex. Civ. App.—Fort Worth 1952, writ ref'd n.r.e.).

531. TEX. R. CIV. P. 791, 792, 793, 794.

532. Corder v. Foster, 505 S.W.2d 645, 648 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

533. Mize v. Wood County, 460 S.W.2d 152, 155 (Tex. Civ. App.—Tyler 1970, no writ); McCraw v. City of Dallas, 420 S.W.2d 793, 797-98 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.). *Compare* Farhart v. Blackshear, 434 S.W.2d 395, 399-400 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.) *with* Means v. Protestant Episcopal Church Council, 503 S.W.2d 591, 592-93 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

534. *See* Johnson v. Durst, 115 S.W.2d 1000, 1005 (Tex. Civ. App.—Austin 1938, writ dism'd); *cf.* Goslin v. Beazley, 339 S.W.2d 689, 699 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.), *cert. denied*, 368 U.S. 7 (1961).

535. TEX. R. CIV. P. 796, 797.

536. Castro v. Wurzbach, 13 Tex. 128, 129 (1854).

537. Coleman v. Beardslee, 16 S.W. 1011, 1012 (Tex. 1891).

pointment is unique to the trespass to try title suit,[538] and it is unnecessary where there is no dispute or where the pleadings adequately describe the property.[539]

A plaintiff is entitled to a judgment for title and possession of land to which the defendant disclaims title, notwithstanding the lack of evidence.[540] This procedure is appropriate in that

> [a] disclaimer is not an answer or defense plea . . . . [I]t is an admission upon the record of the right of plaintiff to recover title to the land covered by the disclaimer and the denial of the assertions of any title to the land on the part of the defendant.[541]

Because a disclaimer is considered final,[542] the disclaiming defendant is no longer considered a party to the suit unless there is also a prayer for damages.[543] In the event several defendants are involved, the disclaimer of one will not be considered the disclaimer of all.[544] The usual rules of evidence apply to the trespass to try title suit, and any variance between proof and the pleadings may result in a failure of the plaintiff's suit.[545] Thus, where the statutory requirements are followed, any competent evidence will be admitted to establish a plaintiff's title.[546] As in all civil litigation, the plaintiff must prove his case

538. Mayflower Inv. Co. v. Stephens, 345 S.W.2d 786, 796 (Tex. Civ. App.—Dallas 1960, writ ref'd n.r.e.).

539. Carlock v. Willard, 149 S.W. 363, 366-67 (Tex. Civ. App.—Dallas 1912, writ ref'd).

540. Williams v. Humble Oil & Ref. Co., 139 S.W.2d 346, 349 (Tex. Civ. App.—El Paso 1940, writ dism'd jdgmt cor.).

541. Hansen v. Holland, 65 S.W.2d 510, 512 (Tex. Civ. App.—Texarkana 1933, writ ref'd); *see* Cowden v. Cowden, 143 Tex. 446, 452, 186 S.W.2d 69, 72 (Tex. 1945).

542. *See* Sanders v. Taylor, 500 S.W.2d 684, 686 (Tex. Civ. App.—Fort Worth 1973, no writ). (Once a disclaimer is made it cannot be retracted without permission of the court); Scanlan v. Hitchler, 48 S.W. 762, 764 (Tex. Civ. App. 1898, no writ).

543. Watson v. Harrington, 285 S.W.2d 390, 393 (Tex. Civ. App.—Austin 1955, no writ); Williams v. Neil, 152 S.W. 693, 695 (Tex. Civ. App.—Austin 1912, no writ); *accord*, 21 Properties, Inc. v. Romney, 360 F. Supp. 1322, 1327 (N.D. Tex. 1973).

544. Rio Bravo Oil Co. v. Hunt Petroleum Corp., 439 S.W.2d 853, 862 (Tex. Civ. App.—Tyler 1969), *rev'd on other grounds*, 455 S.W.2d 722 (Tex. 1970); Jansen v. Kelley, 206 S.W.2d 856, 858 (Tex. Civ. App.—Austin 1947, writ ref'd n.r.e.).

545. *See* Frazier v. Waco Bldg. Ass'n, 61 S.W. 132, 133 (Tex. Civ. App. 1901, writ ref'd).

546. Blumenthal v. Nussbaum, 195 S.W. 275, 281 (Tex. Civ. App.—Galveston 1917), *aff'd on other grounds*, 221 S.W. 944 (Tex. Comm'n App. 1920, holding approved); Busbice v. Hunt, 430 S.W.2d 291, 293 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.); City of Houston v. McCarthy, 340 S.W.2d 559, 561 (Tex. Civ. App.—Waco 1960, writ ref'd n.r.e.); Meade v. Logan, 110 S.W. 188, 190-91 (Tex. Civ. App. 1908, writ dism'd); *see* Stark v. Stefka, 491 S.W.2d 757, 759 (Tex. Civ. App.—Austin 1973, no writ); Maldonado v. Spencer, 454 S.W.2d 224, 227 (Tex. Civ. App.—Texarkana 1970, no writ); State v. Baxter, 430 S.W.2d 547, 548 (Tex. Civ. App.—Waco 1968, writ ref'd n.r.e.) (photos, maps, expert opinion, lay evidence); Meek v. Bowen, 333 S.W.2d 175, 182 (Tex. Civ. App.—Houston 1960, no writ); Stringfellow v. Brown, 326 S.W.2d

by a preponderance of the evidence.[547] The burden rests on the plaintiff to prove his title;[548] the burden of rebutting that title is not placed on the defendant until the plaintiff has established his own superior title.[549] If the plaintiff fails to satisfy his burden of proof, the defendant is entitled to judgment[550] even though the defendant fails to prove any right of title or possession.[551]

A defendant may prove any defense, whether equitable or legal.[552] The more commonly used defenses are superior title in the defendant,[553] outstanding title in a third party,[554] and title by adverse possession.[555] It has been held that the right to redeem under a tax sale is a complete defense.[556]

The limitation period for filing suit is inapplicable in the recovery of land. If the plaintiff holds legal or equitable title, his dispossession

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1, 4 (Tex. Civ. App.—Fort Worth 1959, no writ); Crews v. Powers, 184 S.W. 363, 366 (Tex. Civ. App.—Amarillo 1916, no writ); Sullivan v. Solis, 114 S.W. 456, 461 (Tex. Civ. App. 1903, no writ).

547. D.T. Carroll Corp. v. Carroll, 256 S.W.2d 429, 432 (Tex. Civ. App.—San Antonio 1953, writ ref'd n.r.e.).

548. Perkins v. Smith, 476 S.W.2d 902, 906 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.); Roberts v. Fraser, 399 S.W.2d 211 (Tex. Civ. App.—Beaumont 1966, writ dism'd); Middle States Petroleum Corp. v. Messenger, 368 S.W.2d 645, 653 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.); Pettis v. Achille, 313 S.W.2d 348, 351 (Tex. Civ. App.—Houston 1958, no writ); *cf.* Jeffus v. Coon, 484 S.W.2d 949, 953 (Tex. Civ. App.—Tyler 1972, no writ) (court explained the presumption in favor of the plaintiff, concerning a missing link in chain of title where that gap exists far up the chain, many years prior to the filing of suit).

549. *See* State v. Noser, 422 S.W.2d 594, 599, 600 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.); Pettis v. Achille, 313 S.W.2d 348, 350, 351 (Tex. Civ. App.—Houston 1958, no writ); Krasa v. Derrico, 193 S.W.2d 891, 893 (Tex. Civ. App.—San Antonio 1946, no writ).

550. Niendorf v. Wood, 149 S.W.2d 161, 163-64 (Tex. Civ. App.—Amarillo 1941, writ ref'd); Capitol Bldg. & Loan Ass'n v. Sosa, 72 S.W.2d 936, 938 (Tex. Civ. App.—San Antonio 1934, no writ).

551. Potts v. Potts, 354 S.W.2d 624, 626-27 (Tex. Civ. App.—Dallas 1962, no writ); Jackson v. Griffin, 302 S.W.2d 266, 267 (Tex. Civ. App.—Waco 1957, no writ).

552. TEX. R. CIV. P. 789; Socony Mobil Oil Corp. v. Belveal, 430 S.W.2d 529, 533 (Tex. Civ. App.—El Paso 1968, writ ref'd n.r.e.), *cert. denied*, 396 U.S. 825 (1969); Briggs v. Freeway Park Dev. Co., 366 S.W.2d 270, 271 (Tex. Civ. App.—Fort Worth 1963, writ ref'd n.r.e.).

553. Tanton v. State Nat'l Bank, 43 S.W.2d 957, 963 (Tex. Civ. App.—El Paso 1931), *aff'd on other grounds*, 125 Tex. 16, 79 S.W.2d 833 (1935); *see* Rice v. St. Louis, Ark. & Tex. Ry., 87 Tex. 90, 94, 26 S.W. 1047, 1048 (1894).

554. Rice v. St. Louis, Ark. & Tex. Ry., 87 Tex. 90, 94, 26 S.W. 1047, 1048 (1894); Brumley v. Neeley, 207 S.W.2d 931, 933 (Tex. Civ. App.—Amarillo 1947, writ ref'd n.r.e.).

555. Branch v. Baker, 70 Tex. 190, 194, 7 S.W. 808, 809-10 (1888); Burress v. Burress, 433 S.W.2d 527, 530 (Tex. Civ. App.—Texarkana 1968, no writ).

556. Lissner v. State Morgage Corp., 29 S.W.2d 849, 852 (Tex. Civ. App.—San Antonio 1930, writ dism'd).

is a continually arising conflict and not subject to limitation.[557] Only where the occupant has been in adverse possession for a statutory length of time, may the plaintiff be barred from recovery.[558]

Recovery of possession is the paramount remedy sought in an action of trespass to try title. Incident to this remedy, the plaintiff may be allowed recovery of damages for the "use and occupation of the premises,"[559] as well as permanent or temporary damages.[560] In the event of permanent damage to the property, recovery will be allowed for the difference in market value before and after the injury to the property.[561] Where the damage is only temporary, the courts will permit recovery of the reduction in value plus the cost of returning the property to its original state.[562] Equitable remedies may be granted,[563] but only where they have been specially pleaded.[564]

Final judgment in the trespass to try title suit is governed by statutory requirements, and it is conclusive as to title or right of possession on the parties and all those persons that claim from, through or under them.[565] An adverse judgment or a take nothing judgment results in a divesting of title and possession as to him and a vesting of that title in the defendant.[566]

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557. Johnson v. Wood, 138 Tex. 106, 110, 157 S.W.2d 146, 148 (1941); Burress v. Burress, 433 S.W.2d 527, 530 (Tex. Civ. App.—Texarkana 1968, no writ). *But see* Wilson v. Meredith, Clegg & Hunt, 268 S.W.2d 511, 517 (Tex. Civ. App.—Beaumont 1954, writ ref'd n.r.e.).

558. Burress v. Burress, 433 S.W.2d 527, 530 (Tex. Civ. App.—Texarkana 1968, no writ); McGowen v. Montgomery, 248 S.W.2d 789, 792 (Tex. Civ. App.—Amarillo 1952, no writ).

559. TEX. REV. CIV. STAT. ANN. art. 7389 (1960); TEX. R. CIV. P. 805; Scott v. Scott, 347 S.W.2d 288, 290 (Tex. Civ. App.—Waco 1961, writ ref'd n.r.e.); *see* Miller v. Knowles, 44 S.W. 927, 929 (Tex. Civ. App. 1898, no writ). *But see* Burns v. Parker, 137 S.W. 705, 706 (Tex. Civ. App.—Dallas 1911, no writ).

560. Scott v. Scott, 347 S.W.2d 288, 290 (Tex. Civ. App.—Waco 1961, writ ref'd n.r.e.) (the cutting and removal of timber); Lee v. Grupe, 223 S.W.2d 548, 551 (Tex. Civ. App.—Texarkana 1949, no writ).

561. Cullum v. Heinzelmann, 352 S.W.2d 516, 518 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e.).

562. *Id.* at 518.

563. Cole v. Waite, 242 S.W.2d 936, 939 (Tex. Civ. App.—Amarillo 1951), *aff'd*, 151 Tex. 175, 246 S.W.2d 849 (1952) (cancellation of deeds); Texas W. Fin. Corp. v. Cochran, 488 S.W.2d 957, 959 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.) (cancellation, rescission, or reformation of deeds); Slaughter v. Roark, 244 S.W.2d 698, 703 (Tex. Civ. App.—El Paso 1951, writ ref'd n.r.e.) (specific performance).

564. Texas W. Fin. Corp. v. Cochran, 488 S.W.2d 957, 959 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.); Rhoades v. Meyer, 418 S.W.2d 300, 301-302 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.); McCormick v. Kennedy, 56 S.W.2d 213, 215 (Tex. Civ. App.—Texarkana 1932, no writ); Packard v. De Miranda, 146 S.W. 211, 213 (Tex. Civ. App.—San Antonio 1912, writ ref'd).

565. TEX. REV. CIV. STAT. ANN. art. 7391 (1960); TEX. R. CIV. P. 804.

566. Latham v. Dement, 409 S.W.2d 429, 434 (Tex. Civ. App.—Dallas 1966, writ

The distinctions between the quiet title suit and the trespass to try title suit have been gradually diminished, and their present similarities indicate a possible conflict in their application. With the abolition of the requirement that the plaintiff in the suit to quiet title must be in possession,[567] there arises an obvious conflict between the courts of law and equity. The rule that one must prove his remedy at law inadequate before requesting equitable relief appears inapplicable here. In several circumstances, the plaintiff may be allowed to bring suit to quiet title where his remedy at law, the trespass to try title suit, would be adequate. A comparative analysis of case law illustrates this. Both suits may be founded on legal or equitable titles,[568] and either type of action allows the plaintiff to bring suit regardless of whether he is in possession.[569] As to adversaries, the two suits propound no differentiating grounds on which to distinguish the causes of action; possession by a defendant, though a possibility, is not necessary.[570] The trespass to try title suit has been found sufficient even to "clear title" where possession was not an issue,[571] and to remove clouds from the title of a plaintiff.[572]

The interaction of the two suits was explained by the supreme court in *Day Land & Cattle Co. v. State*[573] where suit was brought to establish title to certain real property.

> Whatever the rule may be elsewhere, the rule invoked can have no application in the courts of this state, which are not only em-

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ref'd n.r.e.); Hilliard v. Messina, 404 S.W.2d 824, 825 (Tex. Civ. App.—Eastland 1966, no writ).

567. Herrington v. Williams, 31 Tex. 448, 460 (1868) indicates that possession of the plaintiff was a prerequisite to suit in early Texas law.

568. Texas W. Fin. Corp. v. Cochran, 488 S.W.2d 957, 958 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.) (Trespass To Try Title). Ojeda v. Ojeda, 461 S..W.2d 487, 488 (Tex. Civ. App.—Austin 1970, writ ref'd n.r.e.) (Quiet Title).

569. Quiet Title: Tannille v. Copeland, 288 F. 860, 862 (N.D. Tex. 1923); Johnson v. Miller, 173 S.W.2d 280-83 (Tex. Civ. App.—Galveston 1943), *aff'd*, 142 Tex. 228, 177 S.W.2d 249 (1944); Milner v. Whatley, 282 S.W.2d 903, 908 (Tex. Civ. App.—Eastland 1955, writ ref'd n.r.e.). *But see* Brock v. Barnsdall, 22 F. Supp. 786, 787 (N.D. Tex. 1938).

Trespass To Try Title: Dry Land & Cattle Co. v. State, 68 Tex. 526, 536, 4 S.W. 865, 868 (1887); Thomson v. Locke, 66 Tex. 383, 389, 1 S.W. 112, 115 (1886).

570. Dry Land & Cattle Co. v. State, 68 Tex. 526, 536, 4 S.W. 865, 868 (1887) (Trespass To Try Title); Texan Dev. Co. v. Hodges, 236 S.W.2d 436, 439 (Tex. Civ. App.—Amarillo 1951, no writ) (Quiet Title).

571. *See* Giles v. Kretzmeier, 239 S.W.2d 706, 716 (Tex. Civ. App.—Waco 1951, writ ref'd n.r.e.); Wilford, *Judgments of Texas Courts Respecting Real Estate Titles*, 15 TEXAS L. REV. 41, 58 (1937).

572. Ballingal v. Brown, 226 S.W.2d 165, 170 (Tex. Civ. App.—Fort Worth 1950, writ ref'd n.r.e.).

573. 68 Tex. 526, 4 S.W. 865 (1887).

> powered, but required, in every case, to give such relief as the facts presented may authorize or require, without reference to whether the relief be such as a court of equity or a court of law may give.[574]

Thus, it is evident that the trespass to try suit may provide almost all the relief that the quiet title suit affords to the plaintiff.[575] A major distinction, however, evidences the reason for the retention of the quiet title suit. In trespass to try title the plaintiff is required to prove a possessory title regardless of whether he is in possession.[576] If the plaintiff's title is not possessory, his remedy at law is inadequate, and his only relief lies in a suit to quiet title.[577] Thus, for the mortgagee,[578] the holder of a vendor's lien,[579] the lessor of an estate in oil and gas,[580] or a remainderman,[581] the quiet title suit provides the only relief.

The laws of Texas concerning the recovery of title to real property provide the plaintiff with both equitable and legal relief as long as his pleadings and proof meet the established prerequisites. Admittedly, there is an overlap of the trespass to try title suit and the suit to quiet title; and the trespass to try title suit provides the titleholder sufficient recovery as to almost any conflict concerning his real property. Speculation on a unified proceeding providing relief to both possessory and non-possessory plaintiffs[582] merits consideration, since the two suits have evolved to point that only the issue of possessory title separates

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574. *Id.* at 536, 4 S.W. at 869.

575. Wilford, *Judgments of Texas Courts Respecting Real Estate Titles*, 15 TEXAS L. REV. 41, 58 (1937).

576. Standard Oil Co. v. Marshall, 265 F.2d 46, 50 (5th Cir.), *cert. denied*, 361 U.S. 915 (1959).

577. *See* 74 C.J.S. *Quieting Title* § 27 (1951); Wilford, *Judgments of Texas Courts Respecting Real Estate Titles*, 15 TEXAS L. REV. 41, 58 (1937).

578. *E.g.*, Duty v. Graham, 12 Tex. 427, 433 (1854); *see* Humble Oil & Ref. Co. v. Atwood, 150 Tex. 617, 623-24, 244 S.W.2d 637, 640 (1951), *cert. denied*, 345 U.S. 970 (1953).

579. *E.g.*, Stephens v. Motl, 82 Tex. 81, 86, 18 S.W. 99, 100 (1891); *cf.* Buell Realty Note Collection Trust v. Central Oak Inv. Co., 483 S.W.2d 24, 28 (Tex. Civ. App.—Dallas 1972, no writ); Goldenrod Fin. Co. v. Ware, 142 S.W.2d 614, 620 (Tex. Civ. App.—Galveston 1940, writ dism'd jdgmt cor.).

580. *E.g.*, Shell Petroleum Corp. v. State, 86 S.W.2d 245, 248 (Tex. Civ. App.—Austin 1935, no writ). *But see* Thompson v. Thompson, 230 S.W.2d 376, 379 (Tex. Civ. App.—Galveston 1950), *modified & aff'd*, 149 Tex. 632, 641-43, 236 S.W.2d 779, 784-86 (1951).

581. *E.g.*, Evans v. Graves, 166 S.W.2d 955, 958 (Tex. Civ. App.—Dallas 1942, writ ref'd w.o.m.); Hensley v. Conway, 29 S.W.2d 416, 419 (Tex. Civ. App.—Eastland 1930, no writ).

582. *See* Wilford, *Judgments of Texas Courts Respecting Real Estate Titles*, 15 TEXAS L. REV. 41, 59 (1937).

583. Standard Oil Co. v. Marshall, 265 F.2d 46, 50 (5th Cir.), *cert. denied*, 361 U.S. 915 (1959).

them.[583] To retain this distinction means the perpetuation of different pleadings under the different suits when both actions seek the same goal—determination of the status of title. Whether the distinction of possessory title is so engrained as to retain its significance is a question for thought, but seemingly a single, common action for the determination of title to real property would be ideal. Nevertheless, the retention of the suit to quiet title is presently required in order to allow the non-possessory titleholder the right to protect his interests in real property. Consequently, the courts of Texas adhere to the division between the two suits and recognize their application as separate proceedings encompassing different issues.[584]

584. *See* Ellison v. Butler, 443 S.W.2d 886 (Tex. Civ. App.—Corpus Christi 1969, no writ).