THE STATUTE OF FRAUDS IN OIL AND GAS TRANSACTIONS: WHAT DOES IT REALLY MEAN?

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I. THE BASIC RULE

Since its inception the law of Texas has recognized that to promote the stability of land titles and to avoid fraud in transactions involving land, such transactions should be in writing. For these reasons, the Texas Statute of Conveyances and Texas Statute of Frauds require that conveyances and contracts for sale of real property be in writing and signed by the conveyor or party to be charged. TEX. PROP. CODE ANN. § 5.021 (Vernon's 2004); TEX. BUS. & COM. CODE ANN. § 26.01(b)(4) (Vernon 2002). *Reiland v. Patrick Thomas Properties, Inc.*, __ S.W.3d __ 2006 WL 2772848 (Tex. App.—Houston [1st Dist.] 2006, no writ h.). This presentation is intended to be a survey of those statutes and the cases interpreting them. While this paper may not reveal anything new to experienced oil and gas lawyers, our hope is that it will remind the practitioner how the statutes have come to be interpreted and applied over the years.[a]

The test for sufficiency of a writing is essentially the same in both the Statute of Frauds and the Statute of Conveyances**.** *See, e.g., Broaddus v. Grout*, 152 Tex. 398, 258 S.W.2d 308, 309 (1953). Thus, when referring to Texas statutes requiring that a contract conveying real property be in writing, for the sake of simplicity the courts refer generally to the Statute of Frauds. *West Beach Marina, Ltd. v. Erdeljac,* 94 S.W.3d 248 (Tex. App.—Austin 2002, no pet.).

The Statute of Conveyances provides:

> **"Instrument of Conveyance.** A conveyance of an estate of inheritance, a freehold, or an estate for more than one year, in land and tenements, must be in writing and must be subscribed and delivered by the conveyor or by the conveyor's agent authorized in writing."

TEX. PROP. CODE ANN. § 5.021 (Vernon's 2004).

The Statute of Frauds provides:

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[a] Subjects such as adverse possession, the sale of goods (UCC BUS. & C. CODE § 2.201), BUS. & C. CODE § 26.01(b)(6) (governing contracts not to be performed in one year), and the Texas Trust Act (PROP. CODE § 112.004) are beyond the scope of this paper.

Promise or Agreement Must Be in Writing

(a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is

(1) in writing; and
(2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.

(b) Subsection (a) of this section applies to:

* * *

(4) a contract for the sale of real estate;
(5) a lease of real estate for a term longer than one year;
(6) an agreement which is not to be performed within one year from the date of making the agreement;
(7) a promise or agreement to pay a commission for the sale or purchase of:

(A) an oil or gas mining lease;
(B) an oil or gas royalty;
(C) minerals; or
(D) a mineral interest; . . .

UCC BUS. & C. CODE § 26.01 (Vernon's 2002)

The Statute of Frauds requires that a memorandum of an agreement, in addition to being signed by the party to be charged, must be complete within itself in every material detail and contain all of the essential elements of the agreement so the terms can be ascertained from the writing without resorting to oral testimony. *Cohen v. McCutchin,* 565 S.W.2d 230, 232 (Tex. 1978).

Various types of documents may constitute a "memorandum" governed by the Statute of Frauds. There are cases involving: a receipt for the sale of land signed by the owner and describing the property *Fulton v. Robinson,* 55 Tex. 401, 405 (1881); a letter from the buyer and an unsigned deed describing the conveyance and giving the price. *Black v. Hanz,* 146 S.W. 309, 311 (Tex. Civ. App.—Austin 1912, no writ); a letter countersigned by the property owner, describing the property and the sale price. *Taggart v. Crews,* 521 S.W.2d 703, 708 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.); and an executed earnest money contract modified by an oral agreement *Joiner v. Elrod,* 716 S.W.2d 606, 609 (Tex. App.—Corpus Christi 1986, no

writ).

II. THE STATUTE AND OIL AND GAS AGREEMENTS

As most oil and gas practitioners know, the basic agreements used in the business are governed by the Statute of Frauds.

A. Oil and Gas Leases

An oil and gas lease conveys an interest in real estate and must be in writing. *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S.W. 290 (1923);

B. Mineral Deeds

When minerals in place are severed from the surface, they constitute separate and distinctive estates and each estate constitutes real property or land. These conveyances controlled by Section 5.021 and must be in writing. *Humphreys-Mexia Co. v. Gammen*, 113 Tex. 247, 254 S.W. 296 (1923); *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S.W. 290 (1923); *Grissom v. Anderson*, 125 Tex. 26, 79 S.W.2d 619 (1935).

C. Royalty Interests

Royalties, whether payable in money or in kind, are an "interest in land" within the Statute of Frauds provision precluding recovery on an oral agreement to convey an interest. (TEX. BUS. & COMM. CODE § 26.01). *Stovall v. Poole*, 382 S.W.2d 783 (Tex. Civ. App.—Waco 1964, writ ref.d n.r.e.) (Owners of land orally promised to pay the plaintiff a sum equal to the value of 1/32 of oil and gas produced if plaintiff found someone to complete a well for a 60% working interest). *See also, Johnson v. Texas Gulf Coast Corp.*, 359 S.W.2d 91 (Tex. Civ. App.—San Antonio 1962, no writ).

D. Oil Payment out of a Fractional Share in Minerals

The rights of a grantee to an oil payment out of a fractional share in minerals if, as and when produced, saved, and sold, as set forth in a lease, are governed by the Statute of Frauds requirements, and must be evidenced by written instruments. *Minchen v. Fields*, 162 Tex. 73, 345 S.W.2d 282 (1961); citing Prop. Code § 5.021.

E. Farmout Agreements

Farmout agreements usually contain an obligation to convey or assign acreage under oil and gas leases. Accordingly, they are governed by the Statute of Frauds. *Eland Energy, Inc. v. Rowden Oil & Gas, Inc*., 914 S.W.2d 179 (Tex. App.—San Antonio, 1995, writ denied).

F. Area of Mutual Interest Agreements

However phrased, agreements creating areas of mutual interest ordinarily are promises to transfer leases or mineral interests. governed by the Statute of Frauds. *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903 (Tex. 1982) (acreage contribution letter); *Crowder v. Tri-C Resources, Inc.*, 821 S.W.2d 393 (Tex. App.—Houston [1st Dist.] 1991, no writ).

G. Easements

An easement is an interest in land subject to the Statute of Frauds. *Anderson v. Tall Timbers Corporation*, 378 S.W.2d 16, 24 (Tex. 1964); *Pick v. Bartel***,** 659 S.W.2d 636 (Tex. 1983). The rule relating to sufficiency of descriptions of easements is the same as required in conveyances of land. *Vrabel v. Donahoe Creek Watershed Authoritiy*, 545 S.W.2d 53 (Tex. Civ. App.--Austin 1977, no writ); *West v. Giesen*, 242 S.W. 12 (Tex. Civ. App.—Austin 1922, writ ref.); *Bear v. Houston & T.C. Ry. Co.*, 265 S.W. 246, 249 (Tex. Civ. App.—Galveston 1924, no writ).

H. Joint Operating Agreements

A joint operating agreement is often, but not always, subject to the Statute of Frauds. Where an operating agreement incorporated oil and gas leases by reference, in a dispute over whether the parties orally agreed to share the costs of a certain well the operating agreement was subject to the Statute of Frauds. *Hill v. Heritage Resources, Inc*., 964 S.W.2d 89, 135 (Tex. App.—El Paso 1997, pet. denied); *See also, Eland Energy, Inc. v. Rowden Oil & Gas, Inc*., 914 S.W.2d 179, Tex. App.—San Antonio 1995; *Crowder v. Tri-C Resources, Inc.*, 821 S.W.2d 393 (Tex. App.—Houston [1st Dist.] 1991, no writ). However, a different result was reached in different circumstances. See *C&C Partners v. Sun Exploration and Prod. Co*., 783 S.W. 2d 707, 714-715 (Tex. App.—Dallas 1989, writ denied). Here, the court held that written consent was not required for operations. The question presented to the court was whether, under the terms of the operating agreement and industry practice, consent for drilling and completion expenditures had to be in writing. It does not appear that the Statute of Frauds was invoked by either party.

III. KEY ISSUES

A. Sufficiency of the Property Description

While the concept that contracts conveying real property interests must be in writing is easy enough to comprehend, disputes arise nevertheless over what is included in a writing that complies with the Statute of Frauds. A common source of litigation is the sufficiency of the description of the property or interest transferred. No part of the memorandum is more essential than the description of the land. *Smith v. Griffin*, 131 Tex. 509, 116 S.W.2d 1064, 1066 (1938).

Over the years, the Supreme Court has established rules of construction to guide practitioners attempting to create a document which is enforceable under the Statute of Frauds. The most fundamental of these rules is that a conveyance or contract must include within itself or by reference to another existing writing, the means or data to identify the particular property with reasonable certainty. *Wilson v. Fisher*, 144 Tex. 53, 188 S.W.2d 150 (1945). *See also Kmiec v. Reagan*, 556 S.W.2d 567 (Tex. 1977); *Pick v. Bartel*, 659 S.W.2d 636, 637 (Tex. 1983); *Morrow v. Shotwell*, 477 S.W.2d 538, 539 (Tex. 1972). In the case of an easement grant, the description requires a certainty such that a surveyor can go upon the land and locate the easement from the description. *Compton v. Texas Southeastern Gas Company*, 315 S.W.2d 345 (Tex. Civ. App.—Houston 1958, writ ref. n.r.e.).

If enough information appears in the description such that a party familiar with the locality can identify the premises with reasonable certainty, it will be sufficient. *Gates v. Asher*, 154 Tex. 538, 280 S.W.2d 247, 248-49 (1955). Under this theory, words of description are given a liberal construction in order that a conveyance may be upheld. Where the instrument contains the "nucleus of description", parol evidence will be admitted to explain the descriptive words and to identify the land. *Gates*, 280 S.W.2d at 248 (a description contained a typographical error – "Denver Survey No. 2" should have been "Block 2 Denver Survey".

Nonetheless, a contract must, at least, furnish the property description "within itself or by reference to *other identified writings then in existence.*" *Pick v. Bartel*, 659 S.W.2d 636, 637 (Tex. 1983) (emphasis added). *Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc.*, 48 S.W.3d 865 Tex. App.—Houston [14th Dist.] 2001, pet. denied). Oil and gas ventures are nothing if not document intensive, and more often than not, several different documents comprise "the deal." If the conveyance document is deficient, the party attempting to uphold the agreement may not rely on other documents which purportedly provide the property description, such as prospect evaluation sheets, lease brochures prepared for potential investors, and an operating agreement, unless these documents existed at the time the parties entered into the contract. *Swinehart*, 48 S.W.3d at 877.

Multiple writings can constitute a contract sufficient to satisfy the statute of frauds. *Adams v. Abbott*, 151 Tex. 601, 254 S.W.2d 78 (1952). However, if the memorandum consists

of two documents, the second document must refer to the first one. *Morrow v. Shotwell,* 477 S.W.2d 538, 539 (Tex. 1972); *Owen v. Hendricks,* 433 S.W.2d 164, 166-67 (Tex. 1968); *Taber v. Pettus Oil & Refining Co.,* 139 Tex. 395, 162 S.W.2d 959, 961 (1942).

The court must evaluate the sufficiency of the land descriptive to comply with the Statute of Frauds at the time the parties contracted. *Stekoll Petroleum Co. v. Hamilton,* 152 Tex. 182, 191, 255 S.W.2d 187 (1953). Thus, a provision in a contract for the assignment of oil and gas leases was deemed unenforceable giving the assignee the right to acquire 4,000 acres from a 5,000 acre tract, " ... to be selected by Buyer leaving Sellers 1,000 acres equitably checker-boarded in a fashion similar to the checker-boarding in the first block above identified" when the court was unable to find a definite pattern of checker-boarding in the first block. *Stekoll* at 192.

When an unidentifiable portion of land within a larger identifiable tract is described in a conveyance, the transaction is voidable for lack of certainty and does not satisfy the Statute of Frauds. *Texas Builders v. Keller,* 928 S.W.2d 479, 482 (Tex. 1996); *Greer v. Greer,* 144 Tex. 528, 191 S.W.2d 848, 850 (1946); *Smith v. Sorrelle,* 87 S.W.2d 703, 705-06 (Tex. 1935).

B. Use of Extrinsic Evidence

The rule of construction requiring the instrument to identify the property – by itself or with other writings –is not unworkable. The Texas Supreme Court has explained the role of parol evidence with regard to the property description contained in a contract for the conveyance of real property:

> The certainty of the contract may be aided by parol only with certain limitations. The essential elements may never be supplied by parol. The details which merely explain or clarify the essential terms appearing in the instrument may ordinarily be shown by parol. But the parol must not constitute the framework or skeleton of the agreement. That must be contained in the writing. Thus, resort to extrinsic evidence, where proper at all, is not for the purpose of supplying the location or description of the land, but only for the purpose of identifying it with reasonable certainty from the data in the written instrument.

Wilson v. Fisher, 144 Tex. 53, 188 S.W.2d 150, 152 (1945); *see also Pick v. Bartel,* 659 S.W.2d 636, 637 (Tex. 1983) (Extrinsic evidence may not be used for the purpose of supplying the location or description of the property).

An example of this rule in action is *Hoover v. Wukasch,* where the landlord prevailed in a suit for breach of a five-year lease on a parcel of land located at a certain address "… and being

the same property now occupied by lessee herein as tenant of lessor." 152 Tex. 111, 254 S.W.2d 507 (1953). Parol testimony was admitted to describe those portions of the property which were occupied by the tenant at the time the document was executed. This was a summary judgment case. Perhaps the outcome would have been different if there were a factual dispute over the portion of the premises that was occupied.

C. Case Studies – What is a "sufficient" description?

A sampling of decisions aids in the understanding of how the courts apply the various construction rules of construction. The cases indicate a practiced and intentional lack of imagination by the courts in interpreting a property description. Often, even when it appears from the trial record that everyone involved in the transaction knows what property is involved, if the requisite elements are not all present, the description will be deemed insufficient. Examples, all of which cannot be reconciled, follow.

1. *Wilson v. Fisher*, 144 Tex. 53, 188 S.W.2d 150 (1945) – No City, State and County

The description on a of earnest money receipt prepared by the purchaser read: "… brick duplex and garage apt. located at 4328-30 Cedar Springs … The buyer's receipt read: "… 4328-4330 Cedar Springs Road …".

These descriptions were insufficient under the Statute of Frauds and recovery for specific performance was denied. The instruments did not specifically indicate that the seller was the owner, the lot and block number and amount of land were absent, the property was not designated as any particular tract or as situated in any city, county, or state, and the portion to be excluded was not shown. Wilson, 188 S.W.2d at 155.

2. *The Long Trusts v. Griffin*, 50 Tex. Sup. Ct. J. 209, 2006 WL 3524376, Tex. 2006 (not released for publication) – Insufficient Information in the Exhibits

This case addressed two separate letter agreements between the parties. A 1978 letter agreement stated that the subject leases were located:

> "in the Northeast portion of Rusk County, Texas, and consist[ed] of 50+ leases covering approximately 2100+ net mineral acres in the Dirgin and Oak Hill Fields area" as "described in the attached Exhibit 'A'."

Exhibit A provided the lessor name, the survey name, the term, and the net acreage for each lease at issue. *Id.*

The court held the information was insufficient to identify the exact location of the lease with reasonable certainty. It described land only by quantity as part of a larger tract, with nothing to identify what specific portion was intended to be conveyed. Therefore it was voidable for uncertainty of description.

A 1982 letter agreement stated that the subject leases were:

> "… located in the North central portion of Rusk County, Texas, in the North Henderson Field Area, and consist[ed] of 143 leases covering approximately 2100 net mineral acres" as "described in the attached Exhibit 'A.", and "[a]ll of the acreage as shown on Exhibit 'A' (attached) is dedicated to a Gas Contract with Tejas Gas Corporation."

No Exhibit A was attached to the 1982 agreement. *Id.*

The Tejas gas contract referred to in the agreement was in the appellate record, but the court determined that it failed to sufficiently identify the leases, even assuming that was the reference's purpose. The Tejas gas contract defined the term "contract acreage" as "all of the leases and lands described in Exhibit 'A' and outlined on Exhibit 'B'." Exhibit "A" to the gas contract stated the leases were "more fully described as follows," and contained (only) headings for items like lease name, description, and acreage, and was blank below the headings. Exhibit B provided a plat. Another document, also entitled "Exhibit 'A'," was attached at the end of the contract and provided the name and legal description of each lease, but stated that it was "attached to and made part of" a separate seemingly unrelated agreement.

The court concluded that Exhibits A and B to the Tejas gas contract were insufficient to identify the leases at issue. Exhibit A identified no leases and Exhibit B alone (the plat) was insufficient. In the court's view, the Tejas gas contract only provided confusion, not reasonable certainty, as to the identity of each lease in the 1982 agreement. Thus, the court deemed the 1982 agreement unenforceable under the Statute of Frauds.

3. *Matney v. Odom,* 147 Tex. 26, 210 S.W.2d 980 (1948) – Transfer of a Portion of a Larger Tract

Matney granted a lease with an option to purchase the following property:

> "… four (4) acres out of the East end of a 10-acre block on the P. Chireno Survey about 2 miles East from the courthouse of the city of Tyler, Smith County, Texas, located on the North side of the Kilgore highway".

Matney owned only one four-acre tract on the 10-acre block. In determining that the description failed to identify the property with sufficient certainty, the court held: "[A] deed

purporting to convey land, which describes it only by quantity and as being part of a larger tract, with nothing whereby to identify what specific portion of the larger tract is intended to be conveyed, is void for uncertainty of description." *Matney, 210 S.W.2d* at 983. The court noted that there were no words in the lease saying directly or indirectly that Odom owned a piece of land containing the same acreage. The description at issue did not contain a "nucleus of description." *Id.*

4. *Westland Oil Development Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903 (Tex. 1982) – Reference to Another Agreement

At issue was a letter agreement containing two different descriptions, separated by the word "or." For the purpose of analyzing the agreement, the court treated each description separately. If each description were inserted separately into the body, the first description would read as follows:

> If any of the parties hereto, their representatives or assigns, acquire *any additional leasehold interests affecting any of the lands covered by said farmout agreement*, ···, such shall be subject to the terms and provisions of this agreement, (emphasis by court).

In the introductory paragraph to the letter agreement, the parties expressly agreed that a certain Mobil/Westland farmout agreement would be referred to as "said farmout." Copies of that instrument were attached to the letter agreement. The caption to the Mobil/Westland farmout read as follows:

> Proposed farmout of Mobil's leasehold interest in the drillsite section and an undivided one-half of our leasehold interest in Sections … 19, … and 13, 23 and 24, … less the drillsite section for the drilling of a projected Ellenburger test to be located in the SE 1/4 Section 13, … Pecos County, Texas …

The question was whether this description rendered an area of mutual interest agreement enforceable as to sections 19, 23. and 24. The Court found the description to be legally sufficient to satisfy the Statute of Frauds. The operative words were "leasehold interests affecting any of the lands covered by said farmout." The court believed that the words "said farmout" sufficiently provided the nucleus of description. The introductory paragraph defined "said farmout" and the reader was expressly directed to an instrument which contained an adequate legal description. Therefore, the AMI agreement provided a description of sections 19, 23, and 24 which was legally sufficient.

Applying the same method, the second description would say:

> If any of the parties hereto, their representatives or assigns, acquire … any additional interest from Mobil Oil Corporation *under lands in the area of the farmout acreage*, such shall be subject to the terms and provisions of this agreement; … (emphasis by court).

Sections 25, 26, and 30 were in the vicinity of the farmout acreage. Therefore, Westland contended that this second description applied to those three sections and was legally sufficient to permit enforcement of the AMI agreement. The court reached a different conclusion with respect to this description. The phrase "lands in the area of the farmout acreage" did not meet the test. Westland argued that the court should substitute "Rojo Caballos Area" for the word "area" contained in the phrase recited above and argued that parol evidence could be introduced to supply a legal description for "Rojo Caballos Area." The court rejected the argument, reasoning that the description cannot be arrived at "from tenuous references and presumptions of doubtful validity." *Id.* at 909-910.

5. *Crowder v. Tri-C Resources, Inc.*, 821 S.W.2d 393 (Tex. App.—Houston [1 Dist.] 1991, no writ) – Reference to Another Agreement, Again

The parties executed a participation agreement and a joint operating agreement, neither of which contained an AMI provision. After execution of the agreements, Tri-C's landman drew an AMI boundary on a plat. Later, Crowder was not given the opportunity to participate in additional acreage, so he sued.

Even though the AMI agreement was not part of the participation agreement, Crowder contended that the Statute of Frauds was met because Tri-C acknowledged and referred to an AMI in a September 16, 1986, letter, and the Tri-C landman prepared the land plat showing the AMI.

The court found that the alleged AMI agreement failed to comply with the Statute of Frauds. The plat, which may have been a sufficient description of the land included in the alleged AMI, was not signed by a representative of Tri-C and did not refer to the September 16 letter signed by Tri-C. The September 16 letter did not refer to the plat nor did it otherwise describe the land in the AMI. Neither taken together nor standing alone did the plat and the September 16 letter contain the essential elements from which an AMI boundary could be ascertained.

6. *Siegert v. Seneca Resources Corp.*, 28 S.W.3d 680 (Tex. App.—Corpus Christi 2000, no pet.) – Means to Locate the Tract on the Ground

The description in a 1932 mineral reservation was:

> Also 100 acres of land, now situated in Burleson County, Texas, and was formerly part of the Walter Sutherland League, and is lying in the bend of the old Brazos River, on the Burleson County side, as it now runs. This tract of land was formerly part of the Walter Sutherland League in Brazos County, Texas. But now since the Brazos River has changed its course, this land is in Burleson County, Texas, and almost surrounded by the Fisher League. An actual survey made by W.B. Francis on the 26th day of May, 1931 shows the land, contained inside of the banks of the old river to be 98.2 acres of land. If one half of the old river bed should be included in the survey, then the acreage would be 130 acres of land.

No formal field note description was made part of the instrument. The court found that under the nucleus of description theory a field note description was not necessary, citing *Morrow v. Shotwell*, 477 S.W.2d 538, 539 (Tex. 1972).

The land described in the deed was not an unidentifiable portion of a larger tract, which would render it unenforceable. The description had enough detail by which the land could be identified with reasonable certainty. A surveyor testified at trial that at that time – some 70 years later -- he would not have been able to locate the property, but that in 1932 the information on the deed would have been sufficient to locate the property. Also, the land had been resurveyed since 1932 and better descriptions had appeared in later deeds.

7. *Pick v. Bartel,* 659 S.W.2d 636 (Tex. 1983) – Means to Locate the Tract on the Ground, Again

The deed by which Truebenach sold a 165 acre tract to Pick guaranteed "… a right-of-way across the 25-acre tract sold to Walter Bartel." The deed to Bartel, executed five days later and prepared by the same attorney, said: "… [T]his conveyance directs that the grantors are designating that a right-of-way for a road shall be allowed to be had through and over the said 25 acres at a location which will least interfere with the use of the 25 acres ... ."

There was testimony at trial regarding use of the roadway, and it appears that the trial court could have relied on that testimony to designate the location of the easement. The appellate court disagreed, holding that in order to meet the requirements of the Statute of Frauds, the instrument must furnish within itself or by reference to other identified writings an existence, the means or data by which the particular land to be conveyed may be identified with certainty. *Id.* at 637.

The court would not infer that the "25-acre tract sold to Walter Bartel" referred to the alleged servient estate. The owner of the property referred to in the Pick deed was not identified. Moreover, since the Pick and Bartel deeds were dated five days apart, the 25-acre tract had *not* been sold to Bartel at the time the Pick deed was executed. No city, county or state was mentioned in connection with its location. No lot or block number was given, nor was there any indication as to the amount of land. No description by any particular name appeared. In fact, the

Court found that every essential element of the description was left to inference or to be supplied by parol. To permit the Picks to show by parol evidence what land was under consideration would be, in effect, to abrogate the rule requiring contracts for the conveyance of land to be in writing. The court held that, as a matter of law, the description of the land subject to the alleged easement would not support a suit to establish a roadway easement. *Id.* at 638.

8. *Williams v. Ellison,* 493 S.W.2d 734 (Tex. 1973) – Selection at a Later Time

In one instrument, Williams sold Ellison's assignor a 10 acre tract "… in the form of a square with each side being 660 feet in length … located adjacent to and at the intersection of Medina Base Road and Holm Road." The contract made no reference to the 97.81 acre tract, out of which the 10 acre tract was taken.

The instrument also guaranteed an option to purchase "… an additional 10 acres. *Id.* In order to exercise this option … at least a portion of the boundary line of the 10 acre tract so purchased shall be contiguous to a portion of the boundary line of the 10 acres described above in this contract; provided, however, no portion of such option tract shall include the water well presently located on sellers land nor any portion of an area one acre square centered on such water well." *Id.*

The court found the description of the option tract to be insufficient, finding that the description provided a site of origin, but "… no hint as to the distance for which these two tracts were intended to be adjacent or as to which one or more of the first tract's four boundaries the option tract was intended to be abutting." *Id*.. The court found that a surveyor could not go on the premises and locate the option tract on the ground. *Id.*

The court rejected the optionor's contention that the instrument was a type of conveyance where the property would be selected at a later time, finding that the larger tract out of which the selection would be made (known by the court to be the 97.81-acre tract) was not described. Further, the instrument did not say who would make the selection: buyer, seller or someone else.

9. *Eland Energy, Inc. v. Rowden Oil & Gas, Inc.*, 914 S.W.2d 179 (Tex. App.—San Antonio 1995, writ denied) – Selection at a Later Time, Again

A farmout provided that if Cox drilled a producing well on the Perez lease, Rowden would assign him "40 acres in the form of a square as nearly as possible" where the well was located. Thereafter, the parties agreed that rather than a series of assignments of 40-acre production units as each well was completed, it would be easier if Rowden assigned the entire lease, which would be reassigned when drilling ceased. There was an assignment to Cox which was made subject to the farmout. Eland then succeeded to the rights of Cox.

Eland claimed the obligation to reassign undeveloped portions of the Perez lease was unenforceable under the Statute of Frauds. Eland contended that it was impossible to determine at the time of the assignment what would have to be reassigned upon termination of drilling because the parties did not know where the wells and their corresponding 40-acre tracts were going to be. The court disagreed.

The assignment incorporated the Cox farmout, which adequately described the Perez lease. But the court believed the pertinent issue to be whether the title instruments provided an adequate description of the 40-acre tracts that were earned when Cox drilled producing wells.

The farmout agreement granted Cox the unrestricted right and authority to locate his wells anywhere on the Perez lease that he desired. The farmout also gave Cox an equitable right to perfect his title in those tracts by selecting the boundaries of the forty-acre tracts he had earned. *Id.* (*citing Stekoll Petroleum Co.*, 255 S.W.2d at 191). The right to make the designation, coupled with the interest in doing so, satisfied the requirements of the Statute of Frauds. *Id.*

As a practical matter, designations by a co-owner, Prudential-Bache, perfected the equitable title of all interested parties in their respective interests in the Perez lease. Rowden, Prudential-Bache, and Eland were all able at that time to identify the boundaries of their real property interests. The property interests in the Perez lease being adequately described, the court found the Statute of Frauds did not bar the claims.

10. *Taber v. Pettus Oil & Refining Co.*, 139 Tex. 395, 162 S.W.2d 959 (Tex. Com. App. 1942) – What Leases?

A memorandum specified an agreement to buy:

> " . . . One Hundred and Sixty (160) acres of Oil and Gas leases, covering the following described tracts, situated in Live Oak County, Texas, to-wit:
>
> "West Quarter (W1/4) of the most southerly quarter of Section No. 3, J. Poitevent Survey, Live Oak County, Texas, being a part of the Cook Ranch, designated on the 'Plat Map' as Tract #1, and containing 40 acres, more or less. …"

The instrument went on to describe three more quarter-sections in similar detail.

Upon completion of the test well, the assignor was to provide a photostat of the leases, and the assignments were to be on ". . . the regular Texas Standard Form N. 86." The price was specified.

The description was deemed insufficient because it lacked the essential elements of a proper description. *Id.* The deficiency was not in the description of the lands, but in the leases to be assigned and the terms of the assignment. The court found that neither the terms of the leases nor the terms of the assignment could be ascertained at the time the memorandum was executed without resort to parol testimony. *Id* at 399.

D. Must the agency be in writing?

One significant distinction between the Statute of Frauds and Statute of Conveyances relates to an agent signing a contract on behalf of a principal. Under the Statute of Frauds, an agent must be "legally authorized" to act on behalf of the principal. Conversely, under the Statute of Conveyances, any agency agreement must be in writing. *Hoover v. Wukasch*, 152 Tex. 111, 254 S.W.2d 507, 508 (1953). Because the two laws traverse the same types of agreements, the more specific requirement of the Statute of Conveyances should control. For a contract signed by an agent to be binding, the agency relationship must be documented in writing.

There may, however, be an exception to this rule. In *Mondragon v. Mondragon*, the Texas Supreme Court held that this requirement may not be effective when the principal is present at the time the agent signs the contract on the principal's behalf. 257 S.W. 215 (Tex. 1923); *c.f. Bumpas v. Cobb*, 72 S.W.2d 925 (Tex. Civ. App. 1934). *Mondragon* embodies the concept adopted by the courts that a principal present at the time of contract signing ratifies or adopts the contract even though the principal did not formally sign the document. *Pena v. Frost Nat. Bank*, 119 S.W2d 612 (Tex. Civ. App.—San Antonio 1938, writ ref'd); *Houston Oil Co. v. Biskamp*, 99 S.W.2d 1007 (Tex. Civ. App.—Beaumont 1936).

It should be noted that reliance on *Mondragon* is not the preferred method of dealing with an agency relationship in signing a contract. All reasonable efforts should be made to verify that the agency is in writing prior to accepting a lease, assignment or other conveyance from an agent on behalf of a principal.

E. Failure to Comply With the Statute – Is the Transaction Void or Voidable?

A contract that fails to meet the requirements of the Statute of Frauds is not void but is merely voidable. *Enochs v. Brown*, 872 S.W.2d 312, 318 (Tex. App.—Austin 1994, no writ). If the description of property is insufficient to satisfy the Statute of Frauds, the contract is voidable. *Huchings v. Slemon*, 174 S.W.2d 487, 453 (Tex. 1943); *Troxel v. Bishop*, 201 S.W.3d 290 (Tex. App.—Dallas 2006); *Eland Energy v. Rowden Oil & Gas, Inc.*, 914 S.W.2d 179 (Tex. App—San Antonio 1995, writ denied). In essence, either party to a voidable contract can avoid it at their option.

However, there are exceptions to the rule. For example, in *Andersen v. Eliot*, 333 S.W.2d 654, 656 (Tex. Civ. App.—Eastland 1960, writ ref'd), the assignee of leases was not allowed to rely the Statute of Frauds to avoid its obligation to pay for the leases. The assignee has accepted possession of the leases, paid down payment, and had been producing oil the entire time.

Similarly, a party cannot accept the benefits of a lease contract for two years by performing its obligations for that time and then attempt to avoid the contract under the Statute of Frauds. *Wukasch v. Hoover*, 247 S.W.2d 593 (Tex. Civ. App.—Austin 1952, aff'd).

A party would not be entitled to rely on the Statute of Frauds to avoid a voidable contract that has been fully performed in the past but, future obligations can be avoided. *Long Trust v. Griffin*, 2006 WL 3524376 (Tex. 2006); *Eland Energy, Inc. v. Rowden Oil & Gas, Inc.*, 914 S.W.2d 179 (Tex. App.—San Antonio 1995, writ denied).

IV. EXCEPTIONS TO THE RULE

A characteristic of many Statute of Frauds cases is that one party or the other has spent money, invested time, or otherwise acted to his detriment, only to find that someone with whom he thought he had a binding contract either changed his mind, never believed he was bound in the first place, or merely decided he would not perform because he didn't have to. A simple but graphic example of a dry hole doesn't that did not solve a title problem is *Paine v. Moore*, 464 S.W.2d 477 (Tex. Civ. App.–Tyler 1971, no writ). Paine was to pay $2,500.00 for a working interest in a well within 30 days of an invoice if the well was a dry hole. The well was dry, Moore sent an invoice, and Paine refused to pay. When Moore sued, Paine affirmatively pled the Statute of Frauds and the court ruled for him, finding that the letter agreement failed to adequately describe the property.

Despite the harsh results in cases like *Paine*, various doctrines are available to bar the application of the Statute of Frauds. In order to protect the underlying principle, the exceptions are strictly enforced. *Republic National Bank v. Stetson*, 390 S.W.2d 253, 262 (Tex. 1965). All too often, these doctrines are of no help, but the exceptions can be successfully asserted in the right circumstances.

A. Partial Performance

In the name of equity, the courts have occasionally invoked the rule that a contract partially performed can be taken out of the Statute of Frauds. To satisfy the "partial performance" exception, courts require the following elements be established: (1) payment of consideration by the vendee/lessee in either money or services; (2) possession of the property by the vendee/lessee; and (3) permanent and valuable improvements to the property by the vendee/lessee, or, the presence of such facts as would make the transaction a fraud upon the vendee/lessee if not enforced. *Hooks v. Bridgewater*, 111 Tex. 122, 229 S.W. 1114, 1116 (1921); *Swinehart v. Stubbeman, McRae, Sealy, Laughlin & Browder, Inc.*, 48 S.W.3d 865, 883 (Tex.

App.—Houston [14th Dist.] 2001, pet. denied); *Elizondo v. Gomez*, 957 S.W.2d 862, 864 (Tex. App.—San Antonio 1997, pet. denied). Each of these elements has been held to be indispensable. *Penwell v. Barrett*, 724 S.W.2d 902, 904 (Tex. App.—San Antonio 1987, no writ).

Under the partial performance exception, contracts that have been partly performed, but do not meet the requirements of the Statute of Frauds, may be enforced in equity. If denial of enforcement would amount to a virtual fraud upon the party acting in reliance on the contract. *Carmack v. Beltway Dev. Co.*, 701 S.W.2d 37, 40 (Tex. App.—Dallas 1985, no writ). The "virtual fraud" arises when there is strong evidence establishing the existence of an agreement and its terms, the party acting in reliance on the contract has suffered a substantial detriment for which it has no adequate remedy, and the other party, if permitted to plead the statute of frauds, would reap an unearned benefit. *Id.* The performance necessary to take a case out of the operation of the Statute of Frauds must be by the party who seeks to enforce the contract. *Hill v. Heritage Resources, Inc.*, 964 S.W.2d 89, 135 (Tex. App.—El Paso 1997, pet. denied); *Oak Cliff Realty Corp. v. Mauzy*, 354 S.W.2d 693, 695 (Tex. Civ. App.—Fort Worth 1962, writ ref'd n.r.e.).

B. Estoppel

When asserted in the correct circumstance, estoppel can be an exception to the Statute of Frauds. However, in *Crowder v. Tri-C Resources, Inc.*, 821 S.W.2d 393 (Tex. App.—Houston [1 Dist.] 1991, no writ), the plaintiff contended that under the principle of equitable estoppel, defendant Tri-C was prevented from denying the existence of the AMI agreement. Crowder relied on deposition testimony in which a representative of Tri-C stated that Crowder had an AMI. *Id.*

The court denied the claim, holding that estoppel is not an independent cause of action. It is defensive in character functioning to preserve rights, not to bring an independent cause of action into being. *Sun Oil Co. (Delaware) v. Madeley*, 626 S.W.2d 726, 734 (Tex. 1981); *Hermann Hosp. v. National Standard Ins. Co.*, 776 S.W.2d 249, 254 (Tex. App.—Houston [1st Dist.] 1989, writ denied). Therefore, Crowder could not use the doctrine of equitable estoppel to establish a cause of action for a breach of an AMI agreement.

On the other hand, in *Clifton v. Ogle*, which involved a deed to a tract of land, the court stated that "equitable estoppel or estoppel by misrepresentation ... arises where a person, by his acts, representations, or admissions, or even by his silence when it is his duty to speak, intentionally or through culpable negligence induces another to believe that certain facts exist." 526 S.W.2d 596, 602 (Tex. Civ. App.–Fort Worth 1975, writ ref'd n.r.e),

C. Confidential and Fiduciary Relationship

Where a contract is unenforceable because it does not comply with the Statute of Frauds, it may still be enforceable if a special relationship exists between the parties. Two types of special relationships are recognized in the law. The first is a formal "fiduciary" relationship which exists between joint venturers, partners, and attorney and client. The second informal "confidential" relationship exists when parties to an agreement have a high degree of experience and trust with each other arising from a moral, social, domestic, or purely personal relationship.

If a court determines a fiduciary or confidential relationship exists between parties, it will enforce the agreement of the parties despite deficiencies in the contract such as insufficient description. The courts accomplish this by imposing a constructive trust on the property that is the subject of the agreement. *Omohundro v. Matthews*, 161 Tex. 367, 341 S.W.2d 401 (Tex. 1960); *Fitz-Gerald v. Hull*, 150 Tex. 39, 237 S.W.2d 256 (Tex. 1951).

To establish a joint venture there must be either an express or an implied agreement with each of the following characteristics: (1) a community of interest; (2) an agreement to share profits; (3) an agreement to share losses; and (4) a mutual right of control or management of the enterprise. *Coastal Plains Dev. Corp. v. Micrea, Inc.*, 572 S.W.2d 285, 287 (Tex. 1978); *Ayco Dev. Corp. v. G.E.T. Serv. Co.*, 616 S.W.2d 184, 186 (Tex.1981); *Drennan v. Community Health Inv. Corp.*, 905 S.W.2d 811, 822 (Tex. App.—Amarillo 1995, writ denied). If any of these requirements is missing, no joint venture may be established. *Brazosport Bank of Tex. v. Oak Park Townhouses*, 889 S.W.2d 676, 683 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

Conversely, to impose an informal fiduciary duty in a business transaction, the requisite special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit. *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 288 (Tex. 1998); *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex.1997). Specifically, a confidential relationship can arise if, over a long period of time, the parties have worked together in the joint acquisition and development of property before entering the agreement sought to be enforced. *Consolidated Gas & Equip. Co. of Am. v. Thompson*, 405 S.W.2d 333, 336-37 (Tex.1966).

Caution is important, however, the mere fact that a business relationship has been cordial and long lasting is not by itself evidence of a confidential relationship. *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex.1962). Likewise, the fact that one businessman trusts another and relies on another to perform a contract does not give rise to a confidential relationship. *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992); *Seymour v. American Engine & Grinding Co.*, 956 S.W.2d 49, 60 (Tex. App.—Houston [14th Dist.] 1996, writ denied). Subjective trust is simply not sufficient to transform an arms-length transaction into a fiduciary relationship. *Schumberger Tech. Corp.*, 959 S.W.2d at 177; *Farah v. Matrige & Kormanik, P.C.*, 927 S.W.2d 663, 675-76 (Tex. App.—Houston [1st Dist.] 1996, no writ). To

find a confidential or fiduciary relationship, a court must examine the actualities of the relationship between the parties involved. *Thigpen*, 363 S.W.2d at 253; *Turner v. Church of Jesus Christ of Latter-Day Saints*, 18 S.W.3d 877, 897 (Tex. App.—Dallas 2000, pet. denied); *Atrium Boutique v. Dallas Mkt. Ctr. Co.*, 696 S.W.2d 197, 199 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

In *Omohundro v. Matthews*, the Supreme Court considered whether to impose a constructive trust arising out of a joint venture between two parties that were working together to obtain and develop oil and gas leases despite the lack of a written agreement. 161 Tex. 367, 341 S.W.2d 401 (Tex. 1960). Omohundro entered into an oral agreement with two geologists to work together to obtain farmout agreements related to several wells. *Id.* at 401-02. The first two wells the group worked were dry; however, a third well was successful on a lease negotiated solely by Omohundro utilizing information accumulated by him and the two geologists. Omohundro refused to give the geologists an interest in the third well. The Supreme Court found the existence of an oral joint venture among Omohundro and the geologist and imposed a constructive trust on Omohundro to issue each geologist a share of the overriding royalty interest in the well. *Id.* at 408-11.

Similarly, in *Fitz-Gerald v. Hull*, the Supreme Court found a confidential relationship upon facts similar to those in *Omohundro*. 150 Tex. 39, 237 S.W.2d 256 (Tex. 1951). Three individuals orally joined together to obtain a oil and gas lease on lands in Hockley County. The individuals agreed to share expenses and losses. *Id.* at 257. One of the individuals took the lease in his name alone, promising to later transfer the other venturers interest to them. This never occurred and the injured venturers sued the first for imposition of a constructive trust against to transfer the appropriate interest in the lease. *Id.* The court found a confidential relationship among the parties and imposed the trust requested against the malfeasor. *Id.* at 264-65.

In *Ginther v. Taub*, the Supreme Court imposed a constructive trust to protect the interests of two oil and gas investors who orally entered into a business relationship with the defendant Taub. Ginther and Warren owned a large oil and gas lease in Webb County. 675 S.W.2d 724 (Tex. 1984). They became unable to pay delay rentals and made a deal with Taub, a third partner, to help cover the costs. *Id.* at 725. Taub assisted eventually, but as conditions worsened, Taub advised Warren and Ginther to contact an attorney named MacNaughton about possible bankruptcy. *Id.* at 725-727 Taub was a long-time client of MacNaughton, and together the two of them wrestled control of the lease from Ginther and Warren through subversive dealings and fraud. *Id.* The Supreme Court found that Taub had a confidential relationship with Ginther and Warren and imposed a constructive trust against Taub despite the fact that the relationship was never in writing. *Id.* at 728.

One must be careful not to think of fiduciary or confidential relationships as a cure-all for agreements that violate the Statute of Frauds. A breach of fiduciary duty will not be found

simply because one business person relies upon another to carry out a contract that otherwise would be voidable under the Statute of Frauds. *Exxon Corp. v. Breezevale, Ltd.*, 82 S.W.3d 429, 444 (Tex. App.—Dallas 2002, pet. denied). Breezevale provided services to assist Exxon to obtain drilling contracts in Nigeria without a formalized arrangement for payment of services. Though they had discussed the possibility of sharing in Exxon's recovery if it were awarded a contract, no agreement was finalized at the time Exxon was awarded a contract. Exxon sent Breezevale a check for its services and Breezevale sued, alleging a contract existed to share profits. There was no contract in writing and the Statute of Frauds applied, so Breezevale attempted to characterize the relationship as a fiduciary relationship. The court rejected this argument, reasoning that if every relationship between business people were a fiduciary relationship, the Statute of Frauds would be destroyed.

D. Fraud

The Statute of Frauds was created to prevent fraud, thus it cannot be employed to assist in a fraud. For example, *Castrejana v. Davidson*, considered the effect of the Statute of Frauds on a promissory note. 549 S.W.2d 466 (Tex. Civ. App.—San Antonio 1977, no writ). Castrejana gave Davidson a note for Davidson's real estate commission on property Castrejana purchased. Castrejana reneged on the note, claiming it was insufficient to meet the Statute of Frauds. The court held that Castrejana could not use the Statute of Frauds as a sword to avoid paying Davidson for his legitimate work. *Id.*

However, in *Capital Bank v. Am. Eyewear, Inc.*, the scope of this exception was limited to cases where there has been at least partial performance. 597 S.W.2d 17 (Tex. App.—Dallas 1980, no writ). While negotiating a lease that had been heavily revised by both parties, Eyewear returned a draft to Capital with proposed changes. Eyewear contended that Capital orally accepted the changes and an agreement was consummated. Capital never performed on the lease, but challenged Eyewear's right to the lease. *Id.* at 19-20. On appeal, Eyewear relied on the proposition in *Castrejana* that the Statute of Frauds will not permit a fraud. In ruling against Eyewear, the court distinguished *Castrejana* because there was at least partial performance by Davidson. *Id.* Capital never performed but rather challenged the lease, thus the argument was unsuccessful.

This rationale was again followed in *Twelve Oaks Tower I, Ltd v. Premier Allergy, Inc.*, Twelve Oaks leased space in an office building to Premier Allergy under an undocumented assignment from a prior tenant. 938 S.W.2d 102 (Tex. App.—Houston [14th Dist.] 1996, no writ). After occupying the space for approximately two years and making rent payments, Premier vacated the property. Twelve Oaks sued for rents due under the original lease. Premier challenged the lease on the ground that it was barred by the Statute of Frauds. In light of Premier's use of the space and payment of rents, the court refused to allow the Statute of Frauds to interfere with Twelve Oaks' recovery of outstanding rents.

An oil and gas case holding that a material misrepresentation could be a mechanism to avoid the Statute of Frauds is *Placer Energy Corporation v. E & S Oil Company, Inc.*, 692 S.W.2d 197 (Tex. App.—Fort Worth 1985, no writ), in which an assignee of an oil and gas lease allegedly misrepresented that the requirements of the Statute of Frauds had been met, by stating that a written assignment had been executed. This was a reversal of a summary judgment and remand for further proceedings and thus may, however, be of limited precedential value.

E. Contracts Affecting, but not Transferring, Real Estate

It cannot be said that merely because an agreement has some effect on real property, it is governed by the Statute of Frauds. If a real estate transaction is only incidentally involved, the Statute of Frauds will not apply. *Garcia v. Karam*, 276 S.W.2d 255, 257 (Tex. 1955); *Bridewell v. Pritchett*, 562 S.W.2d 956 (Tex. Civ. App.—Ft. Worth 1978, writ ref'd n.r.e.). In *Hydrocarbon Horizons, Inc. v. Pecos Dev. Corp.*, 797 S.W.2d 265 (Tex. App.—Corpus Christi 1990, writ denied) the court treated a promise to pay a cash finder's fee and a 1/32nd overriding royalty as outside the Statute of Frauds because the transaction concerned oil and gas after it was produced, and was not provided for in an existing oil and gas lease. Therefore, according to the court, the real estate was only incidentally involved. *Id*. at 267. It is difficult to reconcile this result with decisions from other courts of appeal, and the language of Statute of Frauds itself. (see p. 2, *supra*).

F. Implied Easement by Necessity

While, strictly speaking, not governed by the Statute of Frauds, an implied easement can be created when a grantee seeks an easement over land once owned by a common grantor but conveyed to third parties. *Bickler v. Bickler*, 403 S.W.2d 354, 357 (Tex. 1966). "The elements are: (1) unity of ownership prior to separation; (2) access must be a necessity and not a mere convenience; and (3) the necessity must exist at the time of severance of the two estates." *Koonce v. Brite Estate*, 663 S.W.2d. 451, 452 (Tex. 1984). The necessity "must be more than one of convenience for if the owner of the land can use another way, he cannot claim by implication to pass over that of another to get to his own." *Duff v. Matthews*, 311 S.W.2d 637, 640 (Tex. 1958).

G. Prescriptive Easement

A prescriptive easement occurs when a person uses someone else's land in an open, notorious, continuous, exclusive adverse manner for a period of ten years. *Brooks v. Jones*, 578 S.W.2d 669, 673 (Tex. 1979). The hostile and adverse element is the same as that which is necessary to establish title by adverse possession. *Othen v. Rosier*, 148 Tex. 485, 226 S.W.2d 622 (Tex. 1950). One test of determining whether a claim is hostile is whether the adverse possessor's use, occupancy, and possession of the land is of such a nature and character as to

notify the true owner that the claimant is asserting a hostile claim to the land. *Scott v. Cannon*, 959 S.W.2d 712, 722 (Tex. App.–Austin 1998, pet. denied). The claimant must intend to obtain a permanent right to use the property, not merely to obtain permission to do so. *Vrazel v. Skrabanek*, 725 S.W.2d 709, 711 (Tex. 1987). The use of the alleged easement with the owner's express or implied permission or license cannot rise to the level of a prescriptive easement no matter how long the use continues. *Vrazel*, 725 S.W.2d at 711; *Othen*, 226 S.W.2d at 626-27.

With respect to the hostility requirement, Texas courts are divided on whether uninterrupted use alone will give rise to a prescriptive easement. *See, Johnson v. Dale*, 835 S.W.2d 216, 219 (Tex. App.–Waco 1992, no writ) (open and continuous use of roadway for more than ten years raises rebuttable presumption that the use was non-permissive and, thus, adverse); *but see Rust v. Engledow*, 368 S.W.2d 635, 638 (Tex. Civ. App.–Waco 1963, writ ref'd n.r.e.) (mere use alone will never give rise to a prescriptive easement); *Scott*, 959 S.W.2d at 721-22 (use alone will give rise to a prescriptive easement only if the use is exclusive to the claimant).

H. Easement by Estoppel

The doctrine of easement by estoppel provides that the owner of the alleged servient estate is estopped from denying the existence of an easement by making representations that have been relied upon by the owner of the alleged dominant estate. *Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 209 (Tex. 1962). The elements of easement by estoppel include: (1) a representation was communicated, either by word or action, to the promissee; (2) the communication was believed; and (3) the promissee relied on the communication. *Storms v. Tuck*, 579 S.W.2d 447, 452 (Tex. 1979). The rationale for the doctrine of easement by estoppel was described by the Texas Supreme Court in *F.J. Harrison & Co. v. Boring & Kennard*, 44 Tex. 255 (1875):

> The owner of land may create an easement by a parol agreement or representation which has been so acted on by others as to create an estoppel in pais. As where he has by parol agreement granted a right of such easement in his land, upon the faith of which the other party has expended moneys which will be lost and valueless if the right to enjoy such easement is revoked, equity has enjoined the owner of the first estate from preventing the use of it.

Harrison, 44 Tex. at 267.

Once an easement by estoppel is created, it is binding upon successors in title so long as reliance upon the existence of the easement continues. *Holden v. Weidenfeller*, 929 S.W.2d 124, 131 (Tex. App.–San Antonio 1996, writ denied).

Application of the doctrine of easement by estoppel depends upon the unique facts of each case. *See Drye*, 364 S.W.2d at 209-10. Courts have reached varied results concerning the doctrine, especially with respect to its application to a vendor-vendee relationship and whether silence or acquiescence, by itself, is enough to satisfy the requirements for easement by estoppel. *See e.g. Stallman v. Newman*, 9 S.W.3d 243, 247-48 (Tex. App.–Houston [14th Dist] 1999, pet. denied) (landowner's failure to act did not create easement by estoppel over road used with permission); *Scott*, 959 S.W.2d at 720-21 (vendor-vendee relationship is required to create easement by estoppel); *Wilson v. McGuffin*, 749 S.W.2d 606, 610-11 (Tex. App.–Corpus Christi 1988, writ denied) (no easement by estoppel over road used with permission); *Storms*, 579 S.W.2d at 451-54 (indicating that vendor-vendee relationship is not necessarily required to create easement by estoppel); *Wallace v. McKinzie*, 869 S.W.2d 592, 595-96 (Tex. App.–Amarillo 1993, writ denied) (easement by estoppel created by permissive and acquiescing behavior with respect to use of road); *Murphy v. Long*, 170 S.W.3d 621, 628 (Tex. App.–El Paso 2005, pet. denied) (an easement by estoppel may exist without a vendor-vendee relationship); *LaTaste Enterprises v. City of Addison*, 115 S.W.3d 730, 736 (Tex. App.–Dallas 2003, pet. denied) ("Mere passive acquiescence to use does not create an easement by estoppel where there is no vendor-vendee relationship between the owners of the alleged servient and dominant estates").

In *Clifton v. Ogle*, 526 S.W.2d 596, 602 (Tex. Civ. App.–Fort Worth 1975, writ ref'd n.r.e), the court stated that "equitable estoppel or estoppel by misrepresentation ... arises where a person, by his acts, representations, or admissions, or even by his silence when it is his duty to speak, intentionally or through culpable negligence induces another to believe that certain facts exist." *Clifton* involved a deeded tract of land and not an easement.

CONCLUSION

The Statute of Frauds and the Statute of Conveyances, while straightforward in their statutory language, are sometimes implicated in transactions where their application is not obvious. As with any statute, the practitioner should be mindful of the pitfalls that await if one loses sight of the purposes of the statutes.