Vanderbilt Law Review

Volume 17
Issue 3 *Issue 3 - June 1964*

Article 24

6-1964

Real Property - 1963 Tennessee Survey

Thomas G. Roady, Jr.

Real Property—1963 Tennessee Survey

Thomas G. Roady, Jr.[*]

I. DEEDS

A. *Construction*

Before 1949,[1] a tenancy by the entireties could be created in Tennessee only as it was at common law[2]—by the presence of the four unities, time, title, interest, and possession.[3] In *Dobbins v. Dobbins*,[4] the grantor conveyed in 1941 a certain parcel of land to himself and his wife, reciting in the deed that they were in fact husband and wife. The grantor predeceased his wife. On her death, her son by a prior marriage brought a partition action against his brother and the grantor's only daughter. The chancellor held that the wife of the grantor took the property in fee under the deed and thus on her death her two sons took as the only heirs. The Tennessee Supreme Court affirmed, holding that a person cannot convey to himself. But an attempt to do so does not make the deed void if there is another grantee capable of taking. The court based its decision on *Hicks v. Sprankle*,[5] which held that where a husband and wife conveyed to themselves land belonging to the wife, the fact that the wife was

[*]Professor of Law, Vanderbilt University; member, Tennessee and Illinois Bars. The author wishes to express his thanks to Mr. William Hume Barr, a student in the School of Law, for his invaluable assistance in the preparation of this article.

1. In 1949, a statute was enacted to permit a husband to convey to himself and his wife as tenants by the entirety if his intent is explicit. TENN. CODE ANN. § 64-109 (1956).
2. See 4 POWELL, REAL PROPERTY 653 (1964).
3. Holt v. Holt, 185 Tenn. 1, 202 S.W.2d 650 (1947).
4. Tenn., Oct. 11, 1963 (unpublished opinion).
5. 149 Tenn. 310, 257 S.W. 1044 (1923).

incapable of taking from herself would not vitiate the deed and the husband would thus take title to the property.

It is a fundamental rule of construction that the court should attempt to determine and give effect to the intent of the grantor.[6] The part of the deed in the instant case which appears to clearly indicate the grantor's intent is found in the granting clause:

> For and in consideration of the love and affection, that I, Henry H. Holloway, entertain for my beloved wife, Francis Holloway, I have bargained and sold, and by these presences do transfer and convey unto the said Francis Holloway, and Henry H. Holloway, (*husband and wife*) their heirs and assigns, a certain tract or parcel of land . . . . (Italics added.)[7]

From this granting clause it seems certain that the intent of the grantor was to create survivorship rights in the property through the creation of a tenancy by the entirety. In fact, the usual form by which such concurrent ownership is created is a recital in the deed that the grantees are husband and wife.[8] Thus, in holding that the heirs of the wife who had been predeceased by her husband were entitled to the property in question, the court implemented the grantor's intention. If the facts had been somewhat different, however, would the court's reasoning that the wife took a fee simple title to the property because her husband could not convey to himself create a result as congruent with the grantor's intention as was that of the instant case? For example, if after the conveyance the wife had predeceased her husband, being survived by children of a previous marriage, would the wife's heirs take the property to the exclusion of the husband? On the other hand, if the wife sold the land to a bona fide purchaser after the conveyance, would the husband have any right to the proceeds? It is suggested that a proper decision in such cases, following the rationale of the instant case, could only be reached by impressing the land or the proceeds therefrom with a constructive trust in favor of the grantor. A grantor is entitled to restitution when as a result of a mistake of law he has conveyed to his wife or another a greater interest in land than he had intended to convey,[9] and such restitution may take the form of a constructive trust held by the grantee or his heirs for the benefit of the grantor.[10]

6. *Id.* at 314, 257 S.W. at 1045.

7. *Supra* note 4.

8. 4 POWELL, REAL PROPERTY 656 (1964).

9. RESTATEMENT, RESTITUTION § 49 (1937). For an analogous situation, see White v. White, 190 N.E.2d 102 (Mass. 1963), where a mother transferred shares of stock to the names of herself and her son as joint tenants with right of survivorship, and both understood that she was to retain complete ownership, but that he should be in a position to advise her. It was held that she could compel the son to transfer the shares to her, since otherwise he would be unjustly enriched as a result of a mistake of law.

10. Strout v. Burgress, 144 Me. 263, 68 A.2d 241 (1949). See 4 SCOTT, TRUSTS § 465 (2d ed. 1956).

However, it is suggested that an alternative rationale might be more generally applicable. As stated above, it is fairly certain that the grantor in the instant case intended to create a tenancy by the entireties with right of survivorship. He failed to achieve this result because the four unities were not present. The majority rule is that when the law of a state denies the grantor a right to create either a joint tenancy or a tenancy by the entirety between himself and another by direct conveyance, such conveyance creates a tenancy in common between the grantor and his intended joint tenant or his spouse.[11] Moreover, since the intention to attach a right of survivorship to the property seems plainly intended, and the supreme court has before construed a similar deed so as to create a tenancy in common with a right of survivorship attached,[12] if the court in the instant case had held that the deed created a tenancy in common with a right of survivorship, any problems similar to those suggested could have been properly dealt with under the trust rationale.

In *Bell v. Hackler*,[13] another case construing a deed having to do with tenancies by the entireties, a widow brought an action against the decedent's children by previous marriages for homestead rights and dower interest in property owned by decedent during his life. Decedent and a previous wife had received the land in question through a deed naming them grantees "as tenants by the entireties during their natural lives and during the life of the survivor of them . . ."[14] and then to their heirs. The defendants claimed under the decedent as his heirs, alleging that by the terms of the deed they would take upon the death of the survivor of the two, in this case the decedent. The supreme court agreed, holding that the decedent had only a life estate in the land after the death of his previous wife and this interest thereby terminated on his death and went by descent to his children; the widow of the second marriage therefore received nothing.

During the period of this survey, it was reaffirmed by the court of appeals that the Tennessee courts are committed to avoiding whenever possible, construction of a deed calling for application of the statute abolishing estates tail.[15] In an action to enjoin the defendants' going upon the property and a decree that plaintiff owned the property in question, the children of the grantor, Rosalie Cox Shrum,

11. Strout v. Burgress, *supra* note 10, at 284, 68 A.2d at 254. The court went on to say that the only two cases which have held contrary are Hicks v. Sprankle, *supra* note 5, considered by the court as controlling in the instant case, and the case on which *Hicks v. Sprankle* relied, Cameron v. Stevens, 9 N.B. 141 (1858).

12. Runions v. Runions, 186 Tenn. 25, 207 S.W.2d 1016 (1948).

13. 365 S.W.2d 900 (Tenn. 1963).

14. *Id.* at 901.

15. TENN. CODE ANN. § 64-102 (1956).

under whom both complainant and defendant claimed, were made parties to the suit.[16] The grantor had obtained the property from her father, who retained in himself a life estate, to her mother for life, and then to Rosalie and her heirs with a reversion if she had no heirs. Complainant had a lease on the land with an option to purchase which he allegedly exercised and obtained a deed which he never recorded. By parol evidence the grantor rebutted complainant's allegation, testifying that she never intended to deed him the land but thought that she had signed only a rental agreement. Defendant Alexander then purchased the land for only a portion of its value and recorded the deed. Before purchasing he made inquiry but found no deed to complainant recorded, and the grantor told him that she owned the land. The court of appeals, middle section, held that the later, recorded deed took over the prior, unrecorded deed of complainant[17] and construed the original deed to Rosalie from her father as vesting in her a life estate with a contingent remainder in her heirs. The pertinent language in the deed was: "Burton Cox reserves a life interest in the tract of land and at his death to Rosalie Cox and her heirs, if any, and if she dies without bodily heirs, it is to revert to the heirs of Burton Cox . . . ."[18] Judge Shriver stated that courts today look at the intent of the grantor rather than the technical meaning of the words; and, therefore, the recorded deed of defendant Alexander being valid, Rosalie only conveyed to him her life interest in the property. In construing a deed, as in the construing of most legal instruments, a court is searching for the intent of the grantor or maker. The court should concern itself only with the grantor's intention,[19] determining that intent by all that the grantor has written irrespective of the sequence or placement of the clauses.[20] The instant case follows the case of *Butler v. Parker*,[21] in which the Supreme Court of Tennessee sought to determine the intention of the grantor rather than to hold to the old interpretation placed upon technical words requiring application of the statute abolishing fee tails.[22] This is done because an application of this statute reduces the hope of issue of the first taker to the bare expectancy of an heir

16. Gregory v. Alexander, 367 S.W.2d 292 (Tenn. App. M.S. 1963).

17. See 6 POWELL, REAL PROPERTY 276 (1958), where it is stated that the fact of recording protects the recorder from all prior unknown and unrecorded instruments.

18. 367 S.W.2d at 297.

19. Hutchinson v. Board, 194 Tenn. 223, 250 S.W.2d 82 (1952).

20. See Roady, *Real Property—1958 Tennessee Survey*, 11 VAND. L. REV. 1368, 1378 (1958).

21. 200 Tenn. 603, 293 S.W.2d 174 (1956).

22. TENN. CODE ANN. § 64-102 (1956).

and results in a situation not unlike that which existed at common law with respect to the Rule in *Shelley's Case*.[23]

B. *Suit To Set Aside Deed*

In *Hinton v. Robinson*,[24] the action was to set aside a deed by which Mrs. Mattie Potts, deceased, conveyed a remainder interest in her home to defendants who were relatives, when she had told complainants that she would convey the property to them for services rendered and had later devised the property to them. A decree of insanity against the deceased grantor had been adjudged void, but she had executed the deed to defendants prior to the nullifying judgment. Complainants asserted that the deed was void because of the judgment of insanity and also grantor's actual incompetency at the time of execution of the deed. The preponderance of the evidence, however, showed that she was competent at the time of conveyance and that she subsequently ratified and confirmed the deed. The court held that from the evidence the grantor was competent when she executed the deed and the insanity decree being a nullity, the conveyance was valid and the complainant's suit was dismissed.

C. *Restrictive Covenants*

In a suit for declaratory judgment as to whether construction of a house on a re-subdivided lot would violate restrictive covenants applicable to a residential subdivision, the supreme court held that where restrictive covenants contain no express restriction against a re-subdivision of any lots, they will not be extended by implication to prevent re-subdivision.[25] The subdivision had been approved by the local planning commission and properly recorded, the lots ranging in size from one to four acres. There were several restrictive covenants governing setback lines, cost and type of buildings that might be erected, a limitation to residential use, and a limitation of only one dwelling on any lot. The recorded plat, however, by certain language, allowed a re-subdivision of the lots with the approval of the planning commission. Mr. Justice Felts, in holding for the complainants, stated that restrictive covenants will be enforced according to the intent of the parties, however, since they are contrary to the right of unrestricted use of property, the covenants will be strictly construed and nothing will be implied beyond their clear and express prohibitions. Since the record plat provided for approval of re-subdivision, the restriction of only one dwelling on a lot referred to either the original

23. See Roady, *Real Property—1957 Tennessee Survey*, 10 VAND. L. REV. 1188 (1957).

24. 364 S.W.2d 97 (Tenn. App. M.S. 1962).

25. Turnley v. Garfinkel, 211 Tenn. 125, 362 S.W.2d 921 (1962).

lots or to approved, re-subdivided lots. It is probably accurate to say that there is a trend in the American courts toward a recognition of the fact that conditions can develop which will justify a court in refusing to enforce restrictive covenants. The court in the instant case affirmed this trend in Tennessee by stating that "a conveyance of the lots by reference to a recorded plat raises no implied covenant that the lots shall remain as shown on the map, or that they may not later be subdivided."[26] This decision may be contrary, however, to the holding of the court in *Hackett v. Steele*,[27] in which it was held that grantees in a subdivision with a general plan and restrictive covenants can enforce them against any other grantee.[28]

II. Titles

A. *Easements*

In *Smith v. Pickwick Electric Cooperative*,[29] cooperative members brought an action against an electric cooperative for an injunction seeking to restrain it from taking easements over complainants' lands without compensation and to require it to provide complainants with electric power. The defendant required everyone applying for membership, which amounted to purchasing electricity from it, to contractually bind themselves to the by-laws of the cooperative, which among other things granted easements over members' lands without cost to the cooperative. A dispute arose as to the location of a transmission line across complainants' property, resulting in complainants' refusal to grant an easement and defendant's refusal to provide electricity. In initiating suit, complainants obtained a mandatory injunction requiring the defendant to furnish electricity, and in so doing, it damaged complainants' property. Complainants claimed that the by-laws were unconstitutional in requiring members to grant easements without just compensation. The chancellor in McNairy County denied the relief sought, but the court of appeals reversed, holding the by-law to be unconstitutional. The supreme court, reversing the court of appeals, held that such a by-law is reasonable and members must abide by it under a contractual obligation, but just compensation in the form of monetary damages will be awarded when the cooperative unjustifiably damages a member's property.

In another case concerning easements, *Rogers v. Murfreesboro Housing Authority*,[30] plaintiff-landowners had executed a right-of-way

26. *Id.* at 923.

27. 201 Tenn. 120, 297 S.W.2d 63 (1956).

28. See Roady, *Real Property—1957 Tennessee Survey*, 10 Vand. L. Rev. 1188, 1197 (1957).

29. 367 S.W.2d 775 (Tenn. 1963).

30. 365 S.W.2d 441 (Tenn. App. M.S. 1962).

deed conveying an easement to the State of Tennessee for the construction of a highway and had received much less than the value of the property, expecting a certain part of the property to be returned to them unused. After construction of the highway was completed, however, the state quitclaimed the unused portion to the defendant housing authority which began to use the property for its own purposes. The evidence showed that the only title the defendant had to the property was the quitclaim deed from the state. In this action to recover damages for the taking of real property, the court of appeals, middle section, held for the plaintiffs, stating that the action of the state in quitclaiming the unused property to defendant amounted to an abandonment of its estate in the property and a fee simple title reverted to the plaintiff. A determinable easement exists only so long as the specified purpose for which it is granted is possible and is being pursued.[31] The original owner of condemned property can recover ownership of that property if he can show abandonment of the easement taken by the condemnor.[32] Of course, action by the condemnor inconsistent with his desire to use the easement is strong evidence on the question of abandonment.[33] Thus, evidence, as in the instant case, of execution of a quitclaim deed is sufficient to show that the condemnor was abandoning his interest and that the fee simple title has reverted to the original landowner.

Where the description in a conveyance shows the conveyed property to be bounded by streets owned by the grantor, the grantee acquires an easement with respect to such streets even though the conveyance does not expressly create an easement in the streets and the streets have not been dedicated to public use.[34] In an action to enforce the opening of streets bounding lots conveyed to complainants,[35] the deeds executed by defendant-grantor and her husband contained a description of the property which included a description and location of two unnamed streets bounding on the lots. These streets were the only means of ingress and egress to one of the lots in question. The defendant attempted to sell some of the lots and recorded a new plat. The lots sold included the property designated for streets in the original plat and in the deeds to complainants. The chancellor granted relief limited to monetary damages, but the court of appeal reversed, holding that monetary damages alone would have constituted impermissible private eminent domain. The court

31. 3 POWELL, REAL PROPERTY 488 (1952).

32. Trautman & Kirby, *Real Property—1954 Tennessee Survey*, 7 VAND. L. REV. 921, 939 (1954).

33. 3 POWELL, REAL PROPERTY 496 (1952).

34. *Id.* at 412, citing numerous cases.

35. Raker v. Butler, 364 S.W.2d 916 (Tenn. App. W.S. 1962).

stated that the grantees of the lots by deeds from a subdivider, reciting that the lots are bounded by streets, are entitled to a decree restraining the subdivider or his successors from conveying any part of the land occupied by the streets, even though there has been no dedication to or acceptance by the city, and that such a conveyance amounted to a dedication of the property designated as streets to the public use. (The supreme court affirmed and denied a writ of certiorari.) When the owner of land conveys a portion of his property which is entirely surrounded by his lands and those of strangers, a right of access over the conveyor's land is usually found even if it is not recited in the deed as in the instant case.[36]

B. *Actual Possession as Notice to Purchaser*

In *Henderson v. Lawrence*,[37] the complainant had become the owner of a certain tract of land by inheritance and had been in continuous possession since 1930. In 1953, she conveyed the land to her common-law husband's son with the agreement that she would continue to live on the land during the rest of her life. In 1962, the son's wife conveyed to defendants after having obtained title by a divorce decree. Defendants demanded possession and the instant suit was brought to enjoin them from interfering with complainant's possession. It was alleged that the original conveyance was obtained by fraud and that complainant had thought she was executing a will when she signed the deed. On appeal to the supreme court from a dismissal on demurrer, the court reversed and remanded for further proceedings since on the face of the pleadings admitted by demurrer the defendants knew both of the alleged fraud and of complainant's actual possession, and such actual possession was sufficient notice to the purchaser to put him on inquiry as to her rights in and to possession of the property. It has been held, contrary to the instant case, that where a grantor remains in possession and his grantee shortly thereafter conveys to a third person, the ultimate purchaser is under no duty to inquire as to the basis for his remote grantor's possession, for the remote grantor is barred from claiming in derogation of his own deed.[38] Possession, however, by a person not the record owner is a large source of inquiry notice, since the purchaser takes the land subject to any rights of the occupier which might be disclosed by a reasonable inquiry.[39]

36. 3 POWELL, REAL PROPERTY 414 (1952).

37. 369 S.W.2d 553 (Tenn. 1963).

38. See 6 POWELL, REAL PROPERTY 288 (1958).

39. 4 AMERICAN LAW OF PROPERTY § 17.12 (Casner ed. 1952). However, § 17.14 gives an example whereby some courts have made an exception to the above rule by saying that the purchaser is not put on notice.

III. EMINENT DOMAIN

A. *Right to Incidental Damages*

If all of the land covered by a lease is taken under eminent domain in fee simple absolute, the majority of American jurisdictions hold that the lease ends and the lessee is entitled only to the net value of the estate condemned, that is, the value of his unexpired term in excess of what he would have had to pay to the lessor for the interest in the property.[40] The Tennessee Court of Appeals considered the condemnation of part of a leasehold estate in *Gallatin Housing Authority v. Chambers*.[41] In this condemnation proceeding the defendant landowner had a parcel of property of which plaintiff had condemned approximately one fifth. The other defendant, Kop-Ron Corporation, a boat manufacturing concern, had a lease on the property with seven years remaining. The rent which Kop-Ron paid was much less than the leasehold since the corporation had made extensive additions and alterations to the land for use in its business. The primary problem was that of valuation of the leasehold estate. The trial court awarded, in addition to the value of the property condemned, incidental damages to the owner and the lessee as compensation for the damage resulting from the partial taking of the whole tract. The damages awarded for the leasehold taken were very low, and from these awards defendant Kop-Ron appealed. The court of appeals, middle section, held that these awards were inadequate and modified the judgment. In so doing he said:

> While . . . the recognized rule is that the total compensation to be paid for a tract of land condemned cannot exceed the unincumbered fee and this total compensation must be apportioned between the reversioner and the lessee according to their respective interests, this is not to say that the amount of incidental damages to the lessee and owner is restricted to the market value of the land taken where only a part of the tract is condemned.[42]

He further stated that "while the amount of these damages cannot exceed the value of the remaining property, they are in addition to the general damages to which the parties may be entitled by reason of the taking of a part of the property."[43] In so holding, the court followed another recent Tennessee decision, *Moulton v. George*,[44] which held that it must be made clear to the jury that the value of the leasehold and incidental damage thereto must

40. See 2 POWELL, REAL PROPERTY 287 (1950).

41. 50 Tenn. App. 441, 362 S.W.2d 270 (M.S. 1962).

42. *Id.* at 452-53, 362 S.W.2d at 275-76.

43. *Id.* at 452, 362 S.W.2d at 275.

44. 208 Tenn. 586, 348 S.W.2d 129 (1961).

be deducted from the value of the fee and incidental damages thereto.[45] The court in the instant case has followed the majority view that since the lease, and the lessee's obligation to pay rent, is not terminated by the partial taking, the tenant is entitled to the value of his leasehold including the present value of the rent reserved on the part taken and restoration damages.[46]

B. *Value of Fee and Leasehold*

In another condemnation proceeding dealing with the valuation of damages for the taking of a fee and a leasehold, the state, acquiring land for highway purposes, averred in its petition that the amount to which the owners were entitled was 114,863 dollars.[47] Since the owners had very little beneficial interest in the land except for its market value, it was the lessee, Knoxville Concrete Pipe Co., who would suffer the greatest damage. The state informed the lessee that the value of the property and the rights thereto had been determined to be 104,393 dollars, the remainder being the value of the fee owner's interest. The lessee thereupon filed a motion accepting the state's valuation and asking the clerk of the court to pay to it the determined amount. The fee owner excepted to the allowance, claiming it would prejudice his rights at trial. The court held that, inasmuch as all parties agreed to the amount allowed to the lessee and the state in its petition did not separate the value of the interest of owners and lessee, the lessee would be permitted to withdraw such amount as allocated by the state's appraisers without waiting for a trial as to the owner's allowance and such withdrawal would not affect owners' rights at trial. It has been previously held in Tennessee that when possession is demanded of a lessee, he is not bound to resist a taking in which he might choose to acquiesce. Having surrendered possession, he is entitled to payment of his separate award which he has chosen to recognize.[48] If some method of allocation of condemnation awards were provided in the lease, litigation like that in the instant case could be eliminated.[49]

C. *Determination of Area Condemned*

In *Brannan v. American Telephone & Telegraph Co.*,[50] a landowner brought suit to enjoin AT&T from using a radio microwave

45. See Roady, *Real Property—1962 Tennessee Survey*, 16 VAND. L. REV. 839, 852 (1962).

46. 1 AMERICAN LAW OF PROPERTY § 3.54 (Casner ed. 1952).

47. State v. Burkhart, 370 S.W.2d 411 (Tenn. 1963).

48. Stapleton v. State, 195 Tenn. 144, 258 S.W.2d 736 (1956). See Trautman & Kirby, *Real Property—1954 Tennessee Survey*, 7 VAND. L. REV. 921, 938 (1954).

49. See Roady, *Real Property—1962 Tennessee Survey*, 16 VAND. L. REV. 839, 851 (1963).

50. 210 Tenn. 697, 362 S.W.2d 236 (1962).

relay tower on land condemned by the company in a prior eminent domain action on the grounds that the tower was higher than authorized by the previous judgment and the microwaves were being sent in a different direction than anticipated. Complainant asserted that this additional height of the tower and the change in direction of the microwaves made his land valueless for the erection of other towers for television relays. The question was whether the prior judgment was valid; and if so, what limitations were placed on defendant's use of the land. The court held the judgment valid, and that AT&T had obtained the broadest possible rights for using the land and the sending of radio signals was not an actionable trespass or invasion of property.

D. *Liability of City for Land Condemned Within Its Borders*

The state brought an action in *State v. Holland*,[51] to enjoin an action at law by a mortgagee against the City of Dayton for the value of a mortgage which he held on land that had been condemned by that city. The state had paid the owner of the property the amount allowed him under the condemnation decree, and the owner had remained silent as to the existence of any encumbrances against his land. The mortgagee had not been made a party to the condemnation action; and although he knew of the proceedings, he did not intervene. The court of appeals for the eastern section denied the state's injunction and held that a mortgagee is not required to come forward and disclose his lien upon learning of condemnation proceedings against the property so incumbered, but he may bring separate action to recover the amount of the mortgage either from the mortgagor or from the condemnor, even if the mortgagor has been paid the full value of the property. The court said that a constructive trust is raised when necessary to justify the ends of justice; and in the instant case, the owner of the property held the value of the mortgagee's lien in trust since it was the owner's duty in all good conscience and honesty to inform the court of the encumbrance. The court held, moreover, that the state was subrogated to the rights of the mortgagee against the owner of the fee. This decision is in line with the majority that holds that any person who has the power to take by eminent domain is privileged to take mortgaged land, but the condemnation award must first be paid to the mortgagee to the amount of his lien and only the balance should be paid to the mortgagor.[52]

Where the state validly exercises its rights and powers under eminent domain, the landowner who may have his right-of-way

51. 367 S.W.2d 791 (Tenn. App. E.S. 1962).
52. 3 POWELL, REAL PROPERTY 602 (1952).

access cut off may proceed against the county under a reverse condemnation action[53] to recover damages.[54] In *Daniels v. Talent*,[55] a reverse condemnation action was brought against Lenoir City to recover damages alleged to have been incurred by reason of an agreement between defendant and the State of Tennessee concerning a road in front of complainant's property. The state highway department had constructed a new highway through the city and in so doing, with the cooperation of the city, had closed a portion of the street passing along complainant's west property line. Thereafter the city abandoned and closed that portion of the street. The complainant alleged that the ingress and egress to his property was thereby impeded and the unsightly condition of the abandoned property lowered the value of his property; the supreme court held, however, that the complaint was insufficient to state a cause of action against the city, inasmuch as it was not alleged that the city agreed to do anything in its corporate capacity with respect to the construction of the highway. The general rule is that owners of lots bordering upon public streets have a private easement of way in the street (a right to ingress and egress to and from their property) in addition to their general right to use it as a member of the public. Interference with the use of this easement would, therefore, entitle the owner to either legal or equitable relief.[56] In fact, it has been held that an abutting landowner's private easement had not been affected by the resolution of a county road board relinquishing all public rights in the road, requiring removal of obstructions placed in the road by another landowner.[57]

E. *Procedural Problems*

United States v. Pressnell,[58] was a proceeding on an ex parte motion of the United States in behalf of the Tennessee Valley Authority to be relieved of minimal court costs assessed against it in a prior condemnation suit. The United States contended that it had sovereign immunity from having court costs taxed against it, and inasmuch as TVA was a governmental corporation, it also was immune. The court held, however, that since the real party in interest was TVA, and since by the enabling legislation creating TVA it was on an equal footing with private corporations, it could

53. TENN. CODE ANN. §§ 23-1423, -1424 (1956).
54. See Roady, *Real Property—1961 Tennessee Survey*, 14 VAND. L. REV. 1387, 1392 (1962).
55. 370 S.W.2d 515 (Tenn. 1963).
56. Roady, *Real Property—1959 Tennessee Survey*, 12 VAND. L. REV. 1318, 1320 (1960).
57. Paschall v. Valentine, 45 Tenn. App. 131, 321 S.W.2d 586 (W.S. 1958).
58. 219 F. Supp. 727 (E.D. Tenn. 1963).

have assessment directed against it by the courts.[59] Although land of a government corporation is generally held subject to the same rules as apply to other landowners under local law,[60] it is interesting to note that this is the first time that TVA has paid court costs in its thirty year history of over 4,000 condemnation suits.[61]

In another action for damages for the taking and injury of land, the plaintiff-landowners had caused a summons to be issued in January 1962, against defendant for damages of 20,000 dollars.[62] However, the petition which was in the form of a reverse condemnation suit was not filed until May, 1962. The plaintiffs had filed a suit in 1959 for damages to their property,[63] but this was dismissed in January, 1961, on grounds other than the merits. By statute,[64] they had one year from the date of dismissal to refile. The court held that the issuing of the summons within one year did not save plaintiffs from the bar of the statute of limitations, since the clerk of the court was without authority to issue the summons until the petition had been filed.

In a federal eminent domain action, the Secretary of the Army sought to condemn certain lands of defendant above the high water-mark of Old Hickory Reservoir.[65] The condemnation was sought by the Declaration of Taking Act of 1931[66] whereby the Secretary of the Army is authorized to condemn land on a government reservoir above water as well as that below if it is for a public purpose. Generally the government would either condemn the land or give the landowner the option to waive severance damages and retain title to the land above the high water mark. If the high water mark cut off the access road to the property the government would then take the whole tract as was the case here. The landowner in the instant case was not given the option since he was mentally incompetent to enter into a binding agreement, and on his death the suit was revived by his heirs. The Sixth Circuit Court of Appeals held that the landowner was not deprived of due process by his not being offered the option since he was paid full value for the land, and that the subsequent rental of the property to the Girl Scouts with a retained power of revocation did not amount to a taking of one person's property for the benefit of another individual.

59. In reaching this decision, the court construed and applied Rule 54(d) of the Federal Rules of Civil Procedure.
60. 1 POWELL, REAL PROPERTY 678 (1949).
61. 219 F. Supp. at 732.
62. Johnson v. Roane County, 370 S.W.2d 496 (Tenn. 1963).
63. TENN. CODE ANN. § 23-1424 (1956).
64. TENN. CODE ANN. § 28-106 (1956).
65. United States v. Agee, 322 F.2d 139 (6th Cir. 1963).
66. 46 Stat. 1421 (1931), 40 U.S.C. § 258a (1958).

IV. LEGISLATION

The legislation in the area of real property which is the product of the Eighty-Third General Assembly signifies progressive thinking on the part of the legislators. There were, of course, the usual housekeeping duties of amendment, but they were few. One such amendment to the section concerning the ten year maximum term of oil and gas leases[67] excludes any lease or conveyance of underground natural gas storage rights.[68] The chapter on registration of deeds[69] was amended so as to provide that where the governing body of a metropolitan government has adopted an official property identification map, every deed offered for recording must show the number or other identifying symbol of the parcel of land as designated in such map.[70] Also, all such deeds offered for registration within the area of a metropolitan goverument must show on the face of the deed the correct mailing address of the new owner if it is different from the address of the property as shown in the body of the deed; and if the tax bills are to be sent to one other than the owner, it also must be designated with the proper mailing address.[71] Another amendment was to the section providing for levy of a warrant against the real property of a corporation for non-payment of taxes when no personal property can be found to satisfy a distress warrant.[72] It provides that such property acquired by any officer or stockholder from the corporation on dissolution or liquidation is liable to attachment for the delinquent taxes of the corporation.[73]

One piece of major legislation in the area which was enacted during the last general assembly was the Horizontal Property Act,[74] which anticipates the growth of condominium apartments in the state. The act provided for the creation of a "horizontal property regime," an apartment building in which individual apartments will be considered as separate parcels of real property to be conveyed and taxed as such. The act also provides for the administration of such apartments.

Two new acts were adopted in 1963 to aid in the work of the water resource division of the Department of Conservation, created in 1957.[75] The first is a water registration act which requires all persons or associations which withdraw fifty thousand gallons of

67. TENN. CODE ANN. § 64-704 (1956).
68. TENN. CODE ANN. § 64-704 (Supp. 1964).
69. TENN. CODE ANN. §§ 64-2401 through -2412 (1955).
70. TENN. CODE ANN. § 64-2413 (Supp. 1964).
71. TENN. CODE ANN. § 64-2414 (Supp. 1964).
72. TENN. CODE ANN. § 67-2720 (1956).
73. TENN. CODE ANN. § 67-2720 (Supp. 1964).
74. TENN. CODE ANN. §§ 64-2701 through -2722 (Supp. 1964).
75. TENN. CODE ANN. § 70-2001 (Supp. 1964).

water per day from any source to register its use with the division of water resources when required. Moreover, if one is using fifty thousand gallons of water per day and increases his use by ten per cent, he must give notice to the division within thirty days.[76] This legislation is used to give the division of water resources a method by which it can approximate the amount of water used in the state. Another such act was the well drillers act[77] which provides that all well drillers must register with and be licensed by the state.[78] It is also required that the well driller shall provide the Commissioner of the Department of Conservation with a "log" of each well drilled, that is, a record of the geological formations penetrated in the drilling of a water well.[79] Such information, it is hoped, will in time provide the Commissioner with sufficient information of the geological formations of the state to validly predict the movements of underground waters. These two acts concerning water use show a growing understanding on the part of Tennessee legislators that the state does have problems in the field of water use, and that in order to develop the water use of the state most beneficially, water legislation is sometimes needed.

76. TENN. CODE ANN. § 70-2005 (Supp. 1964).
77. TENN. CODE ANN. §§ 70-2301 through -2310 (Supp. 1964).
78. TENN. CODE ANN. § 70-2302 (Supp. 1964).
79. TENN. CODE ANN. § 70-2303 (Supp. 1964).