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Equity -- 1962 Tennessee Survey

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The past year appears to have been a relatively unexciting one in the Tennessee chancery courts, if the cases reaching the higher courts on appeal are a fair indication. No new developments in the law are to be found in these appellate decisions, nor have the courts been called upon to adapt established rules to unique fact situations. It may be of some significance that in four of the five cases deemed worthy of comment, the upper court fully agreed with the chancellors' decisions which had denied the relief sought by complainants, and in the fifth case the decree for complainant was modified to reduce the scope of the relief granted below. Whether these results suggest a trend toward restricting the application of the extraordinary remedies of equity, I would not venture to guess; but, by coincidence or not, it was a rather discouraging year for litigants seeking equitable relief in the upper courts.

I. Specific Performance—Statute of Frauds

In *Fortner v. Wilkinson*,[1] the supreme court again demonstrated its inclination to apply the statute of frauds rather strictly in land sale contracts.[2] Plaintiff sought specific enforcement of a real estate sale which defendant, acting as trustee under a security deed of trust, had held and at which plaintiff had been the highest bidder. Defendant accepted plaintiff's check for the full amount of the purchase price, and a further small sum in cash for registration of the deed which defendant promised to prepare for him; but no written memorandum

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1. 357 S.W.2d 63 (Tenn. 1962).

2. See previous references to this subject in Smedley, *Equity—1961 Tennessee Survey*, 14 Vand. L. Rev. 1281, 1294 (1961), and *1958 Tennessee Survey*, 11 Vand. L. Rev. 1267, 1276 (1958).

of the sale was executed. Three weeks later defendant returned the check and cash, and refused to execute the deed. When sued for specific performance defendant pleaded the statute of frauds by demurrer. The chancellor sustained the demurrer and dismissed the suit, and the supreme court affirmed, disposing of the principal issue of the case in one brief sentence: "The sale of land by a trustee under authority of a trust deed is within the purview of the Statute of Frauds."[3] The only authority cited for this proposition was a 90-year-old Tennessee decision.[4] While there appears to have been no later precedent in this state, ample support for the rule is available in other jurisdictions, where the courts have generally agreed that a sale held by a mortgagee under a power of sale or by a trustee under powers conferred by a security deed of trust is not enforceable unless evidenced by some written memorandum.[5]

Two arguments may be advanced with some force against the application of the statute of frauds to such sales. First, since under the usual statute regulating enforcement of the power of sale the trustee or mortgagee is required to hold a public sale, after repeated advertisement, and at a time and place convenient to persons interested in bidding, it may be reasonably contended that there is no real need for the statutory protection against fraudulent claims that a sale was made. Normally in attendance on such occasions would be the trustee or mortgagee, an auctioneer, the debtor-owner, prospective bidders, and miscellaneous bystanders, all of whom could be called on to establish the fact that a sale was or was not made. With this array of evidence available, the courts should generally be able to determine whether a claim is false, and the removal of the writing requirement would make it possible to prevent the injustice which arises from allowing the dissatisfied party to repudiate a sale merely because it was oral. However, it must be conceded that such a result is not suggested by a literal reading of the typical statute of frauds, and no case has been found in which this reasoning has been adopted.

A second argument is that these foreclosure sales should come under the widely accepted rule that judicial sales are not within the application of the statute of frauds.[6] Under this view, it is reasoned

3. Fortner v. Wilkinson, 357 S.W.2d 63, 64 (Tenn. 1962).

4. Adams v. Scales, 60 Tenn. 337 (1872).

5. See Brown v. Roberson, 214 Ala. 18, 106 So. 181 (1925); Seymour v. National Bldg. & Loan Ass'n, 116 Ga. 285, 42 S.E. 518 (1902); Weiner v. Slovin, 270 Mass. 392, 169 N.E. 64 (1930); Coffman v. Brannen, 50 S.W.2d 913 (Tex. Civ. App. 1932).

6. *In re* Susquehanna Chem. Corp., 92 F. Supp. 917 (W.D. Pa. 1950); Green v. Freeman, 126 Ga. 274, 55 S.E. 45 (1906); Beeson v. Pierce, 51 Ind. App. 201, 98 N.E. 380 (1912); Cook v. Safe Deposit & Trust Co., 172 Md. 398, 191 Atl. 713 (1937); Przewozniczek v. Machowiez, 123 Misc. 376, 205 N.Y. Supp. 795 (Erie Connty Ct. 1924); Robertson v. Smith, 94 Va. 250, 26 S.E. 579 (1897); Rice v. Ahlman, 70 Wash. 12, 126 Pac. 66 (1912).

that since the sale conducted by the trustee or mortgagee takes the place of a foreclosure sale held pursuant to judicial proceedings, it should be placed in the same classification as regards the formal requirements. However, the courts have rejected this logic. It is true that in one sense the creditor's sale is equivalent to a judicial sale in a foreclosure proceeding—*i.e.*, in both instances the security lien is enforced by cutting off inferior interests in the land and by raising money to pay off the secured debt.[7] However, in relation to the statute of frauds, there is said to be a vital difference, because when the sale is held under authority of a court there is no need for a written agreement between the parties as a means of forestalling fraudulent claims. As the Tennessee court has explained:

> [I]n sales directed in a Chancery Court, the whole business is transacted by a public officer under the guidance or superintendence of the Court itself. Even when the sale is made, it is not final until a report is made to the Court, and it is approved and confirmed." And in reference to sales by sheriffs the reason of the rule . . . is that "the return is a memorandum of sale, by authority of law, which can be made available to the purchaser.[8]

The trustee's or mortgagee's sale, though publicly held, is conducted under the authority conferred privately by the debtor, and is not surrounded by such safeguards as court supervision, judicial confirmance and written reports made by a public official.

Even while conceding the force of this line of reasoning, one may still be justified in feeling that the law should not allow the foreclosing creditor to take advantage of his own omission in order to defeat the expectations of the unwary purchaser who has not realized that he should obtain a written evidence of the sale. In the *Fortner* case, plaintiff alleged that he attended the sale which was held as advertised, that he made the highest bid and gave his check to defendant for the full amount of the price, that defendant accepted the check, kept it for three weeks, and then returned it with a letter. Since the letter apparently did not mention the purpose for which the check had been given, all of these events produced neither a memorandum signed by the party to be charged nor part performance sufficient to support a specific performance decree,[9] and so the pur-

7. Seymour v. National Bldg. & Loan Ass'n, *supra* note 5.

8. Adams v. Scales, *supra* note 4, at 341, quoting Smith v. Arnold, 5 Mass. (C.C.) 420, and Nichol v. Ridley, 13 Tenn. 63 (1833). See also *In re* Susquehanna Chem. Corp., *supra* note 6, at 918: ("The purchaser at a judicial sale enjoys sufficient protection by the decree of the court under which the sale was made."); Beeson v. Pierce, *supra* note 6, 98 N.E. at 381; Robertson v. Smith, *supra* note 6, 26 S.E. at 580.

9. Tennessee has not adopted the part performance doctrine as a basis for enforcing oral land sale contracts in equity [see discussion in Note, 2 VAND. L. REV. 451 (1949)], but even in the jurisdictions which do apply that doctrine, payment of the purchase price is generally not considered sufficient past performance.

chaser was left without remedy either at law or in equity. While the court seems to have followed the prevailing rules of law in this case, the result of such a decision lends some weight to the contention that the statute of frauds may produce as much injustice as it prevents.

II. RESCISSION—FRAUD AND MISTAKE

An attempt by the grantor to have two deeds rescinded on grounds of fraud and grossly inadequate consideration was unsuccessful in *Pipkin v. Lentz*,[10] because of the insufficiency of plaintiff's proof to sustain his allegations of fraud, and perhaps because of either a failure of plaintiff to present the other phase of his case concisely or a failure by the court of appeals to view this argument in its intended context. In 1947, plaintiff had inherited 65 acres of land from his adoptive mother, who had purchased the property earlier in the same year for $9,000. His adoptive father acquired curtesy rights in this land, due to the fact that a child, which had lived only a few hours, had been born to him and his wife many years earlier. At the age of 19, plaintiff obtained a chancery court decree removing his disability of minority, and the following day he conveyed 7 acres of the 65 acre tract to defendant for $1,200, neither party realizing that the land was subject to the curtesy. Plaintiff went to Texas to live, but returned in about 18 months and offered to sell the remaining 58 acres to defendant. The latter, having by then learned that plaintiff's father had some interest in the land, was not anxious to buy, but finally did offer $550, which offer plaintiff accepted. The deed conveying the 58 acres to defendant recited that plaintiff sold, conveyed, etc., "all right, title and interest, being a one-half share and interest in and to a certain tract . . .[describing the 58 acre tract]."[11] This conveyance was made in November, 1955, and soon thereafter defendant purchased the father's curtesy interest in the entire 65 acres for $6,500. Four years later, the land having risen considerably in value, plaintiff brought suit to have the conveyances he had made to defendant set aside "for fraud and such inadequate consideration as to shock the conscience of the court." As an alternative basis for relief, plaintiff alleged that he had conveyed only a one-half interest in the 58 acre tract.

The chancellor dismissed the bill, on findings that the evidence did not indicate that defendant had fraudulently induced plaintiff to make the conveyances, and that the second deed conveyed all of plaintiff's interest in the land. The court of appeals affirmed, and in a careful review of the proof submitted clearly demonstrated that plaintiff's

10. 354 S.W.2d 87 (Tenn. App. M.S. 1961), *cert. denied*, execution no. 10, 195-6, Tenn. Sup. Ct., July 26, 1961.

11. Pipkin v. Lentz, *supra* note 10, at 88.

claim of fraud was not sustained. In rejecting the other basis for rescission, however, the court was not as persuasive in its resolution of the question of what interest in the land the parties had thought was being conveyed. Pointing out that the deed first declared that "all right, title and interest" was transferred, the court reasoned that the phrase immediately following, "being a one-half share and interest," could not limit the all-inclusive effect of the preceding language. Two rules of construction were cited in support of this conclusion:[12] (1) An instrument should be construed against the grantor when the description of the quantity of the estate is doubtful; (2) When the property is sufficiently described as a whole, that description cannot be limited by a general statement which may be given a construction inconsistent with the prior inclusive grant. However, the court asserted that it would not be controlled by technical rules of construction, but rather would "look to the intention of the instrument as a proper guide." So saying, it immediately invoked a code provision which declares that: "Every grant . . . of real estate, or any interest therein, shall pass all the estate or interest of a grantor . . . unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied in the terms of the instrument."[13] This statutory mandate and plaintiff's own testimony that he thought he was selling all of the interest he had in the property were found to require the conclusion that the deed conveyed the fee title subject to plaintiff's father's curtesy interest, and not merely a one-half interest in the land.

Though fairly persuasive as far as it goes, this reasoning resolves the case only by ignoring what appears to have been a mutual mistake of the parties which might well call for rescission of the 58-acre deed. Surely the phrase "being a one-half share and interest" was inserted in the deed for some purpose, and the only apparent purpose it could have served was to indicate precisely the quantity of the estate which the parties regarded as being conveyed. In this sense, it is not inconsistent with the broader term which precedes it, because, when read together, the two parts of the granting clause indicate that the grantor intended to state: "I convey all of *my* right and title, which is a one-half share and interest in the property."

The circumstances under which the conveyance was made bear out this assumption. After buying the 7-acre tract, defendant discovered that plaintiff's title to the property inherited from his mother was not absolute, but that the father had some interest in it. When the second deed was made, therefore, both parties knew that plaintiff was not actually conveying "all right, title and interest" in the 58

12. *Id.* at 93.
13. TENN. CODE ANN. § 64-501 (1956).

acres, because he did not have the ability to do so. They knew he could only convey whatever interest the father did not own. Knowing that at the death of the mother, plaintiff and his father were the persons to whom the mother's property passed, but not understanding the nature of a curtesy right (as laymen can hardly be expected to do), they could naturally assume that plaintiff and his father each had an undivided one-half interest in the land. Against this background, the statement in the deed that a one-half interest was being conveyed becomes unambiguous, and neither the technical rules of construction, the code provision, nor plaintiff's testimony requires a finding that the parties intended to convey a fee subject to curtesy.

If a one-half interest was the estate which the parties had in mind, the price of $550 was apparently agreed upon as a fair amount for that interest. However, the fee to the entire tract, though subject to curtesy, was certainly much more valuable than a one-half interest, and so the mutual mistake of the parties must have resulted in a clearly inadequate consideration having been set for the conveyance of plaintiff's actual estate in the land. The court conceded that the consideration for the 58 acres was inadequate, in view of the fact that defendant purchased plaintiff's fee interest in the entire 65-acre tract for only $1,750 and then soon afterwards paid plaintiff's father $6,500 for his curtesy interest, which would continue only during the father's lifetime. Under this state of facts, plaintiff could have made a very strong case for rescission of the second deed on the ground of mutual mistake of material fact,[14] because the resulting transaction conferred an unintended and undeserved benefit on defendant and imposed an oppressive hardship on plaintiff. Though it was correctly observed in the *Pitkin* case opinion that mere inadequacy of consideration is not ordinarily a basis for such equitable relief,[15] mutual mistake which produces a grossly unfair bargain does justify rescission, with such adjustment of the equities as the court deems proper.[16]

14. MCCLINTOCK, EQUITY §§ 88, 89 (2d ed. 1948); POMEROY, EQUITY JURISPRUDENCE §§ 856, 856a, 870, 871a (5th ed. 1941); RESTATEMENT, CONTRACTS § 502 (1932). The Tennessee courts have repeatedly recognized mistake as a ground for rescission of deeds or contracts. Early v. Street, 192 Tenn. 463, 474, 241 S.W.2d 531, 536 (1951); McMillan v. American Suburban Corp., 136 Tenn. 53, 59, 188 S.W. 615, 617 (1916); Spivey v. Roadman, 6 Tenn. App. 442, 447 (E.S. 1927).

15. 354 S.W.2d at 92. See also Stamper v. Venable, 117 Tenn. 557, 97 S.W. 812 (1906); Talbott v. Manard, 106 Tenn. 60, 59 S.W. 340 (1900); Mann v. Russey, 101 Tenn. 596, 49 S.W. 835 (1898).

16. In his bill of complaint, plaintiff indicated his willingness to repay to defendant the amount he had paid for the two deeds, thus satisfying the requirement that the party seeking rescission must make restitution of the consideration received from the other party. See MCCLINTOCK, *op. cit. supra* note 14, § 86. If only the 58-acre deed were to be rescinded (it being the only one to which the mutual mistake ground discussed in the text would apply), the court could require plaintiff to make some payment to compensate defendant for the burden of the curtesy interest which he unwittingly assumed in purchasing the 7-acre tract.

III. New Trial After Judgment at Law

Further evidence of the reluctance of Tennessee chancery courts to grant new trials after judgments at law was provided by the decision in *Proffitt v. Stalans*.[17] The courts of this state have long declared that the chancellors have the power to grant such relief,[18] but the occasions on which the power has actually been exercised are apparently extremely rare.[19] A general test for determining whether equity should grant a new trial to the unsuccessful party in a law suit was adopted in early decisions and has been frequently reiterated in later opinions: "This kind of relief . . . when granted, must be based upon clear proof of fraud on the part of the successful party at law, or of unavoidable accident, unmixed with negligence on the part of the unsuccessful party or his agent."[20] Occasionally, the ground relied upon for persuading the chancellor to order a new trial has been that complainant did not receive a fair trial of the case at law because of some fraud or imposition by the opposing party;[21] but more often the complaint is that after an adverse judgment at law, the unsuccessful party has been unable, because of accident or mistake, to secure a new

17. 209 Tenn. 214, 352 S.W.2d. 231 (1961).

18. See Wallace v. Walker, 197 Tenn. 473, 274 S.W.2d 5 (1954); Tennessee Cent. Ry. v. Tedder, 170 Tenn. 639, 98 S.W.2d 307 (1936); Kirkpatrick v. Utley, 82 Tenn. 96 (1884); Powell v. Cyfers, 48 Tenn. 526 (1870); George v. Alexander, 46 Tenn. 641 (1869); Seay v. Hnghes, 37 Tenn. 155 (1857); Gibson, Suits in Chancery §§ 1269-1271 (5th ed. 1955).

19. In the *Proffitt* case, note 17 *supra*, at 232, it was said that the last reported case in which the supreme court had approved such relief was O'Quinn v. Baptist Memorial Hosp., 182 Tenn. 558, 188 S.W.2d. 346 (1945); and in the *O'Quinn* opinion the statement is made: "We have, in the instant case, *for the first time*, a showing of facts and circumstances which, as held by the chancellor, clearly sustain the claim of complainant below to relief." 182 Tenn. at 562, 188 S.W. 2d at 348. (Emphasis added.) However, relief had been granted also in Holcomb v. Canady, 49 Tenn. 610 (1871). See also State *ex rel.* Terry v. Yarnell, 156 Tenn. 327, 5 S.W.2d 471 (1927).

20. Powell v. Cyfers, *supra* note 18, at 527. Substantially the same statement is to be found in most of the other cases cited in notes 18 and 19 *supra*.

21. Powell v. Cyfers, *supra* note 18 (complainant alleged that he was unable to appear and defend in the law action because of threats to his person; relief denied because he failed to allege that the opposing party was responsible for the threats, and because complainant could have defended adequately through an attorney); Wallace v. Walker, *supra* note 18 (complainant alleged that the opposing party had prevailed in the law action by use of false testimony; relief denied because the allegations were too general to state a ground for equity's intervention); Holcomb v. Canady, *supra* note 19 (complainant alleged that his failure to appear to defend at law was due to the unsettled conditions immediately following the Civil War, he being old and infirm and unable to travel to the county in which the suit was brought, and that plaintiff at law had deliberately filed the action in such a manner as to take advantage of complainant's difficulties; relief granted on the ground that, if the allegations were true, the judgment at law was "unfairly and unconscientiously obtained"). In George v. Alexander, *supra* note 18, the complainant sought equitable relief on the ground that he had discovered a defense to the cause of action at law only after the judgment had become final.

trial or to obtain an authenticated bill of exceptions as a basis for an appeal.[22] In the latter situation, the granting or denial of equitable relief generally turns on whether the court determines that complainant's troubles are of his own making.

Such was the case in *Proffitt v. Stalans*. In the action at law, a judgment for $1,890 had been rendered against the present complainants; but the motions of both parties for a new trial had been sustained, and at the second trial the judgment against the present complainants was for $6,690. Their motion for another trial was denied, but an appeal was granted. However, when the bill of exceptions was presented to the trial judge, certain exhibits which had been used in the trial were missing, and the judge refused to sign the bill or to allow the appellants to supply copies of the exhibits. The original exhibits had been deposited with the clerk of the court, and were eventually found, but not until several days after the deadline for authenticating the bill of exceptions. Consequently, the court of appeals could only review the case on the technical record, and affirmed the judgment below. Contending that the failure to perfect a bill of exceptions was due to accident not caused by their fault, and that because of the lack of a bill of exceptions they were deprived of an effective appeal, complainants filed a bill in the chancery court to obtain a new trial and an injunction against enforcing the judgment. The chancellor sustained a demurrer to the bill, and the supreme court affirmed. Recognizing the power of the chancellor to grant such relief, the court declared that the power should not be exercised "unless the party aggrieved was fraudulently or unlawfully or unconsciously deprived of his regular remedy for the correction of the errors, if any, committed in the law court."[23] In determining that complainants failed to meet this test, the court stressed two factors: (1) complainants had already had their case tried twice in the law court, both trials had ended in adverse judgments, and the trial judge had found no cause for disturbing the second judgment; and (2) complainants had delayed four months after the second trial before presenting the bill of exceptions for authentication, apparently without checking to see whether the needed exhibits were still available.

The significance of the first factor appears to have been diminished by the court's own declaration that "we are in no sense intending to comment on the merits of the lawsuit because the merits and demerits

22. O'Quinn v. Baptist Memorial Hosp., *supra* note 19; Larkey Lumber & Wrecking Co. v. Byrnes, 181 Tenn. 405, 181 S.W.2d 361 (1944); Tennessee Cent. Ry. v. Tedder, *supra* note 18; State *ex rel.* Terry v. Yarnell, *supra* note 19; Kirkpatrick v. Utley, *supra* note 18; Seay v. Hughes, *supra* note 18; Mitchell v. Porter, 26 Tenn. App. 498, 173 S.W.2d 443 (W.S. 1942).

23. Proffitt v. Stalans, *supra* note 17 at 217, 352 S.W.2d at 234.

of that case are not before us . . . ."[24] The court's further observation that "it is presumed until shown otherwise that this was a valid and fair judgment," does not seem to damage complainants' position in the present proceedings, because he is not asking the court to declare the judgment unfair or invalid, but is seeking only an opportunity to overcome the presumption of validity in a new trial.

The main basis for denying relief would seem, therefore, to lie in the conclusion that complainants' inability to perfect the bill of exceptions resulted from their own negligence. Since it was not complainants, but rather the clerk of the circuit court, who misplaced the exhibits, and since the practice of delaying the final preparation of the bill of exceptions until near the end of the allotted time is not particularly unusual among attorneys, the decision may be somewhat harsh. Nevertheless, it conforms to the established tendency of the Tennessee courts to hold the appellant at law to a very strict standard of diligence in pursuing the regular legal means of obtaining a new trial or perfecting an appeal.[25] Only in situations in which complainant had no conceivable way to secure the desired action from the law court has the granting of a new trial by a chancellor been approved—as where the trial judge was appointed to the supreme court and left the circuit bench two days after the judgment was rendered,[26] and where the trial judge arbitrarily refused to sign a bill of exceptions because the opposing counsel would not approve it.[27] Whether or not the policies of achieving prompt termination of litigation and

24. *Ibid.*

25. See, *e.g.*, Seay v. Hughes, *supra* note 18 (after the bill of exception was signed by the circuit judge, it was lost by him before ever being delivered to appellant); Tennessee Cent. Ry. v. Tedder, *supra* note 18 (trial judge was out of the state during the last week in which the bill of exceptions could be signed, and his clerk signed the bill on telephoned instructions from the judge, but this was not sufficient to authenticate the bill); Larkey Lumber & Wrecking Co. v. Byrnes, *supra* note 22 (trial judge was appointed to the court of appeals bench three weeks after the judgment, so that appellant was not able to obtain his signature on the bill of exceptions during the last week of the alloted 30-day period); Mitchell v. Porter, *supra* note 22 (the judgment was rendered on the last day of the term of court, and the unsuccessful party obtained an order from the trial judge to extend the term in order to allow a motion for a new trial to be filed, but the order was legally insufficient because of a technical omission). In each of these instances, the complainant was denied equitable relief because the court ruled that it would have been possible for him to have pursued his legal remedy effectively. See *In re* Lewis' Estate, 45 Tenn. App. 651, 653, 325 S.W.2d 647, 649 (W.S. 1958) in which a court of appeals judge expressed his disapproval of the severity of the requirement of diligence imposed in the *Tedder* case.

26. O'Quinn v. Baptist Memorial Hosp., *supra* note 19: "the plaintiff . . . was extremely diligent. . . . In other words, not a day was lost in an effort to secure his rights. . . . So, applicant's rights were completely cut off without even an opportunity to present either his motion for a new trial or his bill of exceptions for which the law allows thirty days." 182 Tenn. at 562, 188 S.W. 2d at 348.

27. State *ex rel.* Terry v. Yarnell, *supra* note 22: "the petitioner acted with due diligence. . . . We do not see that the petitioner or his counsel has been at all remiss in the matter. . . ." 156 Tenn. at 329, 5 S.W.2d at 471.

of maintaining comity between the chancery and circuit courts justify such a severe restriction on the use of this equitable remedy is debatable; but there is no doubt that Tennessee attorneys have again been put on clear and unequivocal notice to practice the utmost diligence in moving for new trials and in perfecting appeals after adverse judgments.

IV. INJUNCTION—PERPETRATION OF A NUISANCE

Confronted with the troublesome problem of whether to prohibit the operation of a legitimate business enterprise because of its harmful effect on adjacent residents, the Court of Appeals for the Eastern Section in *Hagaman v. Slaughter*[28] wisely followed the pattern which had been established by a sister court in *Crabtree v. City Auto Salvage Co.*[29] a year earlier. In the *Hagaman* case, residents of the city of Bristol who lived near Slaughter's junk yard complained that the premises had become a breeding place for rats and mosquitoes, constituted a hazard to children playing in the neighborhood, and had caused other property in the area to depreciate in value. The chancellor granted an injunction ordering defendant to cease using the premises as a junk yard and to remove the accumulated junk within thirty days. The court of appeals, though agreeing that the evidence fully supported the finding of a nuisance, pointed out that defendant's business is a lawful one and does not constitute a nuisance per se; therefore, it held that "the injunction should have been confined to the offensive features of the operation if that could be done and still allow the business to operate."[30] By this means, equity is able to protect the neighboring residents against the injurious effect of the offensive conditions which the proprietor has allowed to develop on his property, but can still permit him to attempt to carry on his legitimate business in a proper manner. Thus, the conflicting interests of the two parties are reconciled as far as possible. If subsequent experience demonstrates that the business cannot be conducted without the objectionable factors recurring, then an absolute injunction may be obtained.

In addition to reaching a proper result by a sound process of reasoning, the court also found it possible to decide a nuisance case without even taking notice of the strange rule that equity must in some situations refrain from giving injunctive relief until a court of law

28. 354 S.W.2d 818 (Tenn. App. E.S. 1961), *cert. denied*, Tenn. Sup. Ct., Feb. 8, 1962.

29. 47 Tenn. App. 616, 340 S.W.2d 940 (M.S. 1960), discussed in Smedley, *Equity —1961 Tennessee Survey*, 14 VAND. L. REV. 1281 (1961).

30. Hagaman v. Slaughter, *supra* note 28, at 822.

has established the fact that a nuisance exists.[31] One may hope that this is an indication that Tennessee chancery courts are throwing off any lingering effect which this baseless restriction may have had in the past.[32]

V. Rescission—Return of Consideration

In a case which claims attention mostly because of the puzzling situation out of which the suit arose, the supreme court denied rescission of a judgment assignment on the ground that the assignor did not tender the return of the consideration received for the assignment.[33] The creditor had obtained a judgment against his debtor and sureties. Eventually, the sureties paid the judgment, and the creditor assigned all of his rights, title, and interest in it to the sureties, apparently under the impression that he was signing a satisfaction of the judgment rather than an assignment. The sureties promptly assigned the judgment to a third party who had, unknown to the creditor, furnished them the money to pay the creditor. More than four years later, the creditor filed suit to rescind its assignment of the judgment to the sureties, alleging that by a secret agreement between the sureties and the third party, the latter had provided the money and that the sureties had therefore furnished no consideration for the assignment. Both the chancellor and the supreme court ruled that the complaint should be dismissed.

Since the remedy of rescission is designed to restore the parties to the positions they occupied prior to the transaction in question, the party seeking this relief is, of course, required to return whatever consideration he obtained in the transaction, unless the circumstances of the case excuse him from this obligation.[34] In the instant case, two arguments might be advanced on behalf of complainant to justify the granting of a rescission decree in spite of his having failed to make restitution to defendants. First, it could be contended that since defendants did not furnish the consideration for the assignment, they were not entitled to a return of the money received by complainant. No such repayment was needed to restore defendants to status quo, since their original position was, in reality, unchanged. The supreme court disposed of this line of argument by pointing out that,

31. See Crabtree v. City Auto Salvage Co., *supra* note 29, at 627, 340 S.W.2d at 945: "a Court of equity will enjoin and abate nuisances without a judgment at law establishing its existence, where the fact of the nuisance is made manifest by certain and reliable proof, and the resulting injury is of a character that cannot be compensated adequately by damages."

32. See discussion in Smedley, *Equity—1961 Tennessee Survey*, 14 Vand. L. Rev. 1281, at 1283-85 (1961).

33. Lindsey-Davis Co. v. Siskin, 358 S.W.2d 331 (Tenn. 1962).

34. See McClintock, *op. cit. supra* note 14, § 86; Walsh, Equity § 107 (1930).

regardless of who furnished the consideration, complainant had received it, and in failing to tender a return to someone, he violated the maxim that "he who seeks equity must do equity."[35] However, the restitution requirement is hardly imposed on the basis of abstract principles of equity, but rather to assure: (1) that injustice is not visited on a defendant by depriving him of the expected benefits of the rescinded transaction without also relieving him of the burden of his performance; or (2) that unjust enrichment is not conferred on a complainant by allowing him to retain the benefits of defendant's performance while being relieved of his own obligation to perform. In the instant case, if the defendant-sureties did not furnish the consideration for the assignment, they would not seem to be entitled to a return of it. But if rescission of the assignment would put the complainant-creditor in position to collect the judgment from the debtor, then allowing the former to keep the consideration for the assignment would seem to create a case of unjust enrichment. The facts of the case are not stated fully enough in the opinion to support a firm conclusion as to either of these suppositions.

The second argument for sustaining complainant's bill is that equity has the power to make its rescission decree conditional upon complainant's returning the consideration to the proper party, thereby making sure that the rescission will not result in injustice to defendants or unjust enrichment to complainant.[36] While this procedure is admittedly consistent with equity's concept of the restitution requirement, the opinion in this case discloses no strong equitable considerations for granting a conditional decree, inasmuch as there was no indication either that complainant was ready to tender restitution or that complainant had any particular reason for concern as to the source of the money which it received in payment for the assignment.

35. Lindsey-Davis Co. v. Siskin, *supra* note 33, at 333.
36. See note 34 *supra*.