Vanderbilt Law Review

Volume 16
Issue 3 *Issue 3 - June 1963*

Article 24

6-1963

Real Property -- 1962 Tennessee Survey

Thomas G. Roady, Jr.

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I. DEEDS

A. *Construction*

In an action[1] brought in the Chancery Court of Rutherford County to construe a deed, the question presented concerned the nature of the remainder interest created in Richard Siegel, Jr., by a deed whose terms were essentially as follows: to Richard Sr. and wife for life and at their death to their children, Richard Jr. and William and to any other children that may be born to them, "it being the intention of the grantors and grantees . . . that a life estate be vested in the said [Richard Sr.] and wife . . . and at their death the fee *be vested* equally" in Richard Jr., William, and any other children born to Richard Sr. and wife.[2] This was followed by a substantial gift to the

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1. Siegel v. Johns, 354 S.W.2d 66 (Tenn. 1962).
2. 354 S.W.2d at 67. (Emphasis added.)

children of Richard Jr., William, or other children if Richard Sr. and wife should die leaving such child or children. This grant was followed by a habendum clause to the following effect: to Richard Sr. and wife for and during their natural life, and at their death to Richard Jr. and William and any other children born to Richard Sr. and wife or their descendants.[3]

When the action was brought, Richard Sr., one of the life tenants, was dead and complainant's (Richard Jr.) brother, William, was also dead unsurvived by children. Complainant had no children. His mother, the other life tenant, was still alive; there had been no additional children born to the life tenants. Defendant, an heir of the grantor, claimed that complainant held only a contingent remainder; Richard Jr. asserted that his remainder was vested.

The chancellor held that the deed created a life estate in Richard Sr. and wife and that the remainder interest of Richard Jr. would not vest unless and until he survived his mother. He rejected the contention of Richard Jr. that his interest was a vested remainder. The supreme court in an opinion by Chief Justice Prewitt affirmed the decree of the chancellor.

While there is much to be said for not paying too much deference to the rule of construction that vested estates in remainder are to be preferred to contingent estates in remainder,[4] on the facts as stated it is difficult to rationalize the result reached in this case. A deed being involved, the intent of the grantors and grantees in that deed should be carried out, if such intent can be ascertained. The language in the granting clause, which indicated that following the life estate the interest was *to be vested* in Richard Jr., his brother William, and any afterborn brothers and sisters, tends to support the view of the court that the interest of the petitioner was contingent upon his surviving the life tenants. But such language has often been construed as indicating nothing more than the time at which the interest is to vest in possession, not in interest.[5] It would also be logical, and in keeping with respectable authority, to hold that the interest of Richard Jr. and his brother William was vested, subject to open to let in afterborn children of the life tenants and subject to complete defeasance if they should predecease the life tenants, as did William.[6] It is most difficult to understand exactly what is meant by the court's saying that the interest of Richard Jr. is a "contingent

3. *Id.* at 68.

4. 6 AMERICAN LAW OF PROPERTY § 24.19 (Casner ed. 1952); GRAY, RULE AGAINST PERPETUITIES § 103 (4th ed. 1942); LEACH & LOGAN, CASES ON FUTURE INTERESTS AND ESTATE PLANNING 255 (1961); 3 RESTATEMENT, PROPERTY § 243(c) (1940); SIMES, FUTURE INTERESTS § 80, at 266 (1951).

5. 5 AMERICAN LAW OF PROPERTY §§ 21.31, -32 (Casner ed. 1952).

6. LEACH & LOGAN, *op. cit. supra* note 4, at 266-85.

remainder depending upon afterborn children."[7] Certainly the fact that this gift to Richard Jr. and William could be reduced fractionally by the birth of additional brothers and sisters does not necessarily make their interest contingent. As far as the provision for children of Richard Jr., William and any afterborn brothers and sisters is concerned, it very likely violates the rule against perpetuities.[8]

The result of this ruling is that the grantors retained a reversion at the time they executed the deed. This reversion is, of course, a vested interest. The death of the holder of such a reversion could increase his federal estate taxes.[9] Moreover, if the doctrine of destructibility of contingent remainders is still in force in this state, as some believe,[10] Richard Sr.'s wife, the surviving life tenant, and the person or persons holding the reversion could, acting in concert, defeat completely the interest of Richard Jr. It is difficult to believe that the original grantors contemplated that possibility.

In *Prichard v. Carter*,[11] the supreme court affirmed a decree of the Chancellor of Smith County sustaining a demurrer to complainant's bill in ejectment. The defendant was the daughter of complainant and his divorced wife. The defendant, claiming through her deceased mother, contended that her mother had been awarded the tract of land in question in her divorce decree from complainant.

The deed under which complainant claimed was executed in 1914: it named complainant and his wife grantees "for and during their natural life and at the death of both of them to their issue, that is, the issue of their sole marriage." In 1940 complainant's wife had obtained a divorce decree which purported to divest complainant of his interest in the tract of land and to vest the title in his ex-wife, defendant's mother.

The chancellor had properly concluded that the 1914 deed created a joint life estate in complainant and his wife and had held that the divorce decree severed this joint estate and vested title to the entire tract in defendant's mother. The substance of complainant's argument was that the divorce decree did not divest him of his interest in the land but that it merely attempted to award to his deceased wife a "homestead" interest in the tract. This novel argument is nominally supported by language in the divorce decree referring to the land involved as "said homestead." But, as the court pointed

7. 354 S.W.2d at 68.

8. LEACH & TUDOR, THE RULE AGAINST PERPETUITIES §§ 24.12, -.26 (1957); 4 RESTATEMENT, PROPERTY § 374, comment *b* (1940).

9. INT. REV. CODE OF 1954, §§ 2033, 2037.

10. Ryan v. Monaghan, 99 Tenn. 338, 42 S.W. 144 (1897); 2 POWELL, REAL PROPERTY ¶ 314, at 657 (1950); Trautman, *Future Interests and Estates—1954 Tennessee Survey*, 7 VAND. L. REV. 843, 847 (1954).

11. 208 Tenn. 648, 348 S.W.2d 306 (1961).

out, the estate created by the 1914 deed was such that a homestead right, as defined by statute,[12] could not exist in it. That deed conveyed to plaintiff and his wife a joint estate. "Neither was entitled to the occupation of a specific portion of that land to the exclusion of the other. So, Mr. Prichard owned no specific parcel in this tract capable of being set apart as a statutory homestead by metes and bounds. To repeat, the status of the title was wholly repugnant to the legal concept of the statutory homestead which Mr. Prichard's brief says the Court had in mind in the wording of the 1940 divorce decree."[13]

B. SUIT TO SET ASIDE DEED

Wimberley v. Wimberley[14] illustrates the inadvisability of conveyances in consideration of the grantee's agreement to support and maintain the grantors for life. Such deeds have been a fertile source of litigation; often the grantee tires of his bargain or the beneficiary becomes unhappy with the treatment he receives, or does not receive, from the promisor-grantee.

In the instant case, the Court of Appeals for the Western Section affirmed a decree dismissing a suit to have a deed set aside on the ground that the defendant-grantee had failed to furnish a home and provide for complainant's mother and sister, as set out in the deed. Complainant's parents had conveyed the family farm to the complainant and had reserved a life estate. Complainant took possession of the farm; the parents and an incompetent sister continued living there. A few years thereafter, complainant decided to leave the farm and move to town. Complainant then conveyed the farm to defendant (complainant's nephew) by a deed which contained a provision that the latter would provide a home for the mother and incompetent sister. Defendant also gave complainants $1500 and the current year's crops.

A few years later defendant moved from the premises leaving complainant's mother and sister to fend for themselves. Complainant then returned to the farm to care for his mother and sister and offered to return to defendant the purchase price. Defendant refused and this action was brought to set aside complainant's deed to defendant.

The dismissal of the suit in this case turns on the finding that defendant had not breached his obligation under the terms of the deed. His promise, the court found, was merely to allow the beneficiaries to live on the farm; he had not broken this promise. The

12. TENN. CODE ANN. § 26-301 (1955).
13. 208 Tenn. at 654, 348 S.W.2d at 309.
14. 360 S.W.2d 779 (Tenn. App. W.S. 1960).

obligation to support was held to have been undertaken by the complainants at the time of the original conveyance, and their ineffectual attempt to delegate this duty to defendant was itself a breach. The dismissal was without prejudice to the rights of the beneficiaries to bring an action reforming the deeds so as to accomplish the desire of the original grantors. It appears that the complainant was attempting in this action to sue in their behalf;[15] why he was not allowed to do so is difficult to understand.

In *Schlickling v. Georgia Conference Ass'n Seventh-Day Adventists*,[16] the Court of Appeals for the Western Section, sitting for the eastern section, reversed a decree setting aside a deed to the defendant church. A jury had found that the grantor was mentally incompetent at the time the deed was executed. Judge Avery, writing for the appellate court, ruled that there was no competent, substantial, and convincing evidence to support the verdict and that the defendant was entitled to a directed verdict. This ruling was based on conclusions that the only medical evidence tending to show a lack of competency was inadmissible hearsay and that the most to be said for the lay testimony was that the witnesses thought the grantor's belief in the final destruction of the earth on judgment day made her unable to understand the consequences of her act in executing the deeds. This decision reinforces the general belief that the burden of proof in a case to set aside a deed because of mental incompetency of a grantor is virtually intolerable.

The factual setting is interesting. The grantor was a simple German immigrant who had never learned to speak English. She decided, for reasons undisclosed, to give all her property to her church, reserving to herself a life estate. She asked her brother, whose honesty was questionable, to witness the deed. He tried to talk her out of making the gift; unable to do so he left her in anger. Two years later, he claimed portions of the property deeded to the church. This claim was ultimately settled for $10,000 in exchange for his quitclaim deed. Four years later he went to see his sister again; finding her ill and not being cared for by the church, he obtained appointment as her conservator and instituted proceedings to have the deeds set aside. The court appointed a guardian ad litem who contended that neither he nor the church had acted properly and that the grantor needed protection from both of them.

It is apparent from the opinion that the court was not pleased with the conduct of anyone in this action; this general attitude may be the best explanation for the decision. If one looks hard enough for evidence to support the finding of the jury below, one can find it.

15. *Id.* at 780.
16. 49 Tenn. App. 412, 355 S.W.2d 469 (E.S. 1962).

C. BOUNDARY DISPUTES

In an action for ejectment,[17] the Chancellor of Shelby County denied relief to complainants. The action was originally brought to settle a boundary dispute but was properly turned into an ejectment action. The court of appeals reversed and decreed title in complainants with directions to place them in possession of the disputed tract.

The decision of the chancellor had been based on a finding that a boundary line different from that called for in deeds from the common grantor had been proved by the defendant. The court of appeals ruled that it was error to admit testimony that the defendant's grantor had shown him an old fence line and said that this was his west boundary line, because the description in the deed from defendant's grantor was clear and unambiguous. Representations of the grantor as to boundary line locations were merged into the written instrument. Assuming that the court is correct in its interpretation of the clarity of the description in defendant's deed, one cannot quarrel with the decision. A decision to the contrary would have provided a fertile source of litigation.

In *Hendrix v. Yancey*[18] the court of appeals affirmed a decree of the Chancery Court of Dyer County that a complainant is estopped to question the location of a boundary line established by the decree of a court of competent jurisdiction, which is binding upon one with whom complainant is in privity of title. The complainant was properly denied the right to go behind this decree rendered pursuant to an agreement of his and defendant's predecessors in title. The court appeared to go somewhat farther in its decree, indicating that not only was the complainant estopped to claim that boundary was erroneously fixed by the decree but that, considering the calls of deeds to surrounding landowners and expert testimony of local surveyors, the boundary as decreed earlier was the correct one.

II. TITLES

A. *Dedication*

Dedication of real property for public use as a street or roadway is primarily a question of the intent of the owner to make such a dedication. This intent can be manifested formally, as in a plat filed for record, or it may be manifested informally or impliedly by the conduct of the owner over a period of time and the use by the public in such a way as to constitute an acceptance.[19]

17. Minor v. Belk, 360 S.W.2d 477 (Tenn. App. W.S. 1962).
18. 49 Tenn. App. 374, 355 S.W.2d 453 (Tenn. App. W.S. 1960).
19. See Roady, *Real Property—1958 Tennessee Survey*, 11 VAND. L. REV. 1368, 1374 (1958).

In *Payton v. Richardson*[20] an action was brought by a property owner for an injunction to restrain the defendant from obstructing a road the complainants alleged existed across defendant's premises. This road was being used by complainants as a means of ingress and egress to their land. The Chancellor of Davidson County granted the injunction, and the Court of Appeals for the Middle Section affirmed in an opinion by Judge Shriver. Although there had been no express dedication of the right-of-way, the court felt that the evidence in this case was "clear, unequivocal and convincing" of an intent by the owner to dedicate and by the public to accept such dedication. Several cases, the most pertinent being *Johnson City v. Wolfe*[21] were cited for the proposition that the test as to an implied dedication was whether the owner of the dedicated premises had acted and conducted himself in such manner "as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and where it was received and acted upon by the public for such length of time that the public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment of the easement."[22]

In *Hudson v. Collier*[23] lot owners in a subdivision sought to have an area within the subdivision declared a dedicated park and to have cancelled certain quitclaim deeds purporting to convey the park area to defendants. It was also requested that the grantees in such deeds be enjoined from destroying the natural condition of the park area. The Chancery Court of Shelby County denied the requested relief. The Court of Appeals for the Western Section reversed and entered a decree for the complainants.

The deeds which complainants sought to have cancelled purported to convey to defendants an area marked as "Tower Park" on the subdivision plat with reference to which complainants had purchased their lots. This plat, which had been recorded in 1912, recited a dedication of certain streets and alleys but did not expressly recite the intent to dedicate the area in dispute as a park. But for approximately thirty years from the time of the filing of the subdivision plat the grantor and grantees of lots in the subdivision had treated the area as if it were dedicated to public use. Furthermore, the area on the original plat had been designated as "park" property.

In reversing the chancellor, Judge Bejach very properly ruled that on the facts as developed in the case it was "immaterial" that there had been no words expressly dedicating the park to public use. This

20. 356 S.W.2d 289 (Tenn. App. M.S. 1961).
21. 103 Tenn. 277, 52 S.W. 991 (1899).
22. 356 S.W.2d at 291.
23. 48 Tenn. App. 386, 348 S.W.2d 350 (W.S. 1961).

result was reached by construing the plat strictly against the owner filing it for record. Labeling the area on the plat filed for record as a "park" is a sufficient manifestation of intent by the owner to dedicate such area as a park. This intent was further shown by the treatment of the area by the grantor and grantees over a period of years as if it were dedicated to public use.

B. *Easements*

Recognizing that owners of property abutting on public streets have a right of ingress and egress, the interference with or taking of which is normally compensable, the supreme court in *City of Memphis v. Hood*[24] held that the city's interference with this right incidental to a valid exercise of its police power did not give rise to a right of compensation. The case is an interesting one and could well have been decided the other way. Both the Circuit Court of Shelby County and the court of appeals had been persuaded that it was proper for the jury to hear evidence concerning the effect of permanently changing the flow of traffic in front of defendants' businesses from a two-way to a one-way street as an item of incidental damages in connection with the condemnation of a portion of defendants' premises for widening of the street. It is beyond cavil that such a change may be most prejudicial to an abutting owner, particularly where such an owner is operating a business. Why not, then, require the condemning authority to pay? Is it a sufficient answer to the claim of such abutting owner that the condemning authority is acting lawfully and is in so doing exercising its "police power," not the power of eminent domain? The instant case illustrates the difficulty often present in distinguishing between these two powers.[25] Where the question is a close one, as it appears to be in the instant case, should it not always be resolved in favor of the private property right? Surely this will not place any intolerable burden on the condemning authorities and the taxpayers. But the supreme court, in an opinion by Justice Burnett, viewed the change in traffic flow in connection with the condemnation of defendants' property for widening of the street as an exercise of the police power and even though it might result in some injury or loss to the abutting property owner, it was a non-compensable injury. Some weight was apparently given to the idea that the amount of such damages was highly speculative.

An additional point in the case concerning the defendants' right to compensation for the taking of a strip of land which they had

24. 208 Tenn. 319, 345 S.W.2d 887 (1961).

25. The court in the opinion of Justice Burnett on the petition to rehear acknowledges as much. 208 Tenn. at 338, 345 S.W.2d at 895.

dedicated to public use for street widening purposes some ten years earlier was resolved against them and affirmed by the supreme court. The earlier dedication had occurred via the filing of a plat which had been approved by the city planning commission. Defendants argued that this was not an effective acceptance of the dedication as required by the Tennessee Code Annotated, section 13-605, and that even if accepted, failure to use the property for a period of ten years constituted an abandonment of the public rights.

In support of its decision on this latter point, the court cited Tennessee Code Annotated, section 13-609 to the effect that private acts of the legislature would prevail if inconsistent with section 13-605. It was then pointed out that chapter 162 of the private acts of 1921 provided for acceptance of dedications in the manner followed in this case in Shelby County and Memphis.

The court also held that defendants were not entitled to compensation for half of the strip dedicated for street widening purposes where such half was used for a sidewalk rather than for a street. It apparently felt that compensation would be required only in a case where an entirely different public use was made of the dedicated area than that contemplated by the dedicators.[26] Use of a portion of premises dedicated for street widening purposes in construction of a sidewalk was not believed to be a use entirely different from that contemplated by the dedicators.

There is no question but that a right of way can arise or be acquired by prescription. Where one claiming such an easement can prove that he used and enjoyed such claimed incorporeal right adversely, under claim of right, continuously, openly, exclusively, and with the knowledge and acquiescence of the owner of the servient tenement, for the full prescriptive period, he is entitled to protection of such an easement.[27] In *House v. Close*,[28] the court of appeals affirmed a decree of the Chancery Court of DeKalb County that complainants had established a right to use a road over defendants' property through a prescriptive use. The court felt that complainants had used the right of way since around 1904 and met the above test. The fact that defendants had used the right of way along with the complainants, did not render complainants' use non-exclusive nor

26. In support of this point the court cited 26 C.J.S. *Dedication* § 66, at 562 (1955) as follows: "'Where property is dedicated for use as a street or highway, the use thereof is not limited to the means of travel in use at the time of the dedication, but includes the right to use *improved* methods of travel.'" 208 Tenn. at 333, 345 S.W.2d at 893. (Emphasis added.) If the court is suggesting that walking on a sidewalk is an improvement over traveling by car, bus, or taxi in a street, there may be some dispute on the point. Perhaps it is safer to travel on foot.

27. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 270 (1962).

28. 48 Tenn. App. 341, 346 S.W.2d 445 (M.S. 1961).

establish that the use was with defendants' permission. Also, the action of defendant in 1923 in refusing to allow his grantor to reserve an easement across his land did not constitute an interruption of complainants' use nor an extinguishment of their right to use.

In an action for a declaratory judgment as to the right of complainant to tear down a brick wall located on its property, the Chancery Court of Hamilton County decreed the right of complainant to remove the wall. This decision[29] was affirmed by the Eastern Section of the Court of Appeals. It is apparent that the court felt that defendants had acquired no easement in the wall and that there were no facts on which to base an estoppel against the petitioner.

It is significant in this case that the wall of complainant was located entirely on his property. Without the complainant's knowledge the defendants' predecessors in title had constructed a wall on adjoining property, just six inches away from complainant's wall so as to use complainant's wall as a windbreak and rainshield for their wall. Since the defendants' wall had thus been physically concealed from view, its nature was not discovered until complainant, after notice to defendants, started the actual demolition.

The court made short work of the claim of defendants that they had acquired an interest in the continued existence of the complainant's wall solely because it served as a windbreak and rainshield for their wall. In holding that no easement had been acquired on this basis, the court was following precedent and is in line with the vast weight of authority in the United States that a negative easement cannot be acquired by prescription. The reason given, a sound one, is that under ordinary circumstances the owner of the alleged servient tenement has no practical way to interfere with such a claimed easement short of doing something like the complainant did in this case. It is unfair to adopt a rule which would require a landowner, usually at considerable expense, to develop his property in a particular way to avoid having his land subjected to a negative easement.

But the problem presented by the fact that the two walls had been connected by a metal flashing was somewhat more difficult to resolve. Fortunately for complainant, the flashing had been attached in such a way as to deflect water upon the roof of defendants' building, complainant's wall being the higher of the two. If any easement arose in such case as to drainage it probably existed in favor of complainant. However, it would appear that complainant's wall was necessary to support the flashing which was also attached to defendants' building. And, if complainant's wall had been used as a means of support for

29. Mose & Garrison Siskin Foundation v. Church of the Lord Jesus Christ, 357 S.W.2d 833 (Tenn. App. E.S. 1961).

defendants' building for the prescriptive period, one can find considerable authority to the effect that an easement of support would have arisen. The citations of the court to negate defendants' claim on this point do not appear to be particularly applicable to the facts of the case.

C. *Avulsion, Accretion, Reliction*

The rules concerning ownership of land resulting from avulsion, accretion, or reliction are well established, but cases involving an application of these rules are usually quite difficult since the fact situations are complicated and the records voluminous. Once a decision has been made, however, as to whether or not an avulsion, accretion, or reliction has occurred, the title and right to the land is easy to determine. If the location of the land has been affected by an avulsion of a stream the title to the land is unaffected, remaining where it was before the avulsion occurred. However, reliction, the almost imperceptible eroding away of land, results in loss of title to such eroded land by the former owner and accretion results in a gain for the owner of the land the silt deposits join.[30]

In one of several cases that have arisen as a result of the often violent movements of the channel of the Mississippi River, the Western Section of the Court of Appeals reversed[31] a decree of the Chancery Court of Shelby County which had sustained defendant's plea in abatement to complainant's action of ejectment involving land in the Cow Island Bend of the Mississippi River. The plea alleged that the land in question was located in the State of Arkansas and that therefore the court in Tennessee had no jurisdiction of the ejectment action. It was defendant's contention that, while many years ago the river had suddenly and violently cut across Cow Island Bend on the Tennessee side of the river leaving an island which was at that time still in Tennessee, this island had gradually and completely eroded away as the channel of the river moved southeast to its present position and that the eroded land built up by way of accretion to land located on the Arkansas side of the river. If true, the net effect would have been a shifting in the boundary line between the two states in a natural way.

Admitting all of this, Judge Avery cited *State v. Muncie Pulp Co.*[32] for the proposition that where it is contended that a boundary line has been so changed by the forces of nature, it must be supported by the "clearest and most satisfactory evidence." Since the complainant

30. BURBY, REAL PROPERTY 462 (2d ed. 1954).
31. Brown v. Brakensiek, 48 Tenn. App. 543, 349 S.W.2d 146 (W.S. 1961).
32. 119 Tenn. 47, 104 S.W. 437 (1907).

had established that at one time the land in question was within the boundaries of Tennessee, the defendant had the burden of proving clearly that every portion of the land in dispute was a result of accretion to the Arkansas side of the river and that no part of it was still a remaining piece of the island originally created by the avulsion. He felt that not only had the defendant failed to support this by evidence sufficiently clear but that, in fact, the evidence was actually to the contrary.

III. EMINENT DOMAIN

A. *Right to Incidental Damages*

In *Sanders v. Sullivan County*,[33] the Court of Appeals for the Western Section reversed an order of the Circuit Court of Sullivan County granting petitioner-condemnor's motion to set aside part of a jury verdict awarding damages to the landowner for injury to the remainder of defendant's cattle farm incidental to the taking of a portion of defendant's land located on the other side of a public highway. The condemnor argued that since the defendant had purchased the tracts on different dates, held each under a different form of tenancy, and the two tracts were separated by a roadway, they had to be treated as separate and distinct parcels of land. The court denied the contention of the condemning authority, pointing out that it was more important that the defendant had farmed the land as one operation even though the parcels had been acquired at different times and were physically separated by the roadway. The case was, therefore, remanded for a new trial on the issue of incidental damages.

More difficult to appreciate is the court's view that it was appropriate for the jury to consider the value for subdivision purposes of the tract taken in making the award even though the land was and had always been used as farm land. The court apparently felt that such consideration was permissable under the rule which permits a jury to hear all evidence as to value of the land taken for "any and all uses to which it is adapted." Certainly these damage questions arising in condemnation actions are difficult ones to resolve. In the instant case it appears that the land owner got by far the better of it. He will receive the subdivision value, some $18,750, for a tract of land worth $5,000 as farm land. In addition, he apparently is entitled to an award for incidental damages to the farm land he retained across the road. It might have been cheaper for the condemnors to have taken the whole farm.

33. 48 Tenn. App. 531, 348 S.W.2d 909 (W.S. 1960).

B. *Value of Leasehold*

Condemning authorities in acquiring land for highway purposes often find that such land is the subject of separate interests. Where the condemnor is seeking to acquire the fee, it is quite generally held that it is only required to pay the fair market value of the fee, which would appear to be a somewhat simple matter to determine. But where the land sought by the condemnor is subject to a leasehold, the question of valuation becomes confused and the condemning authority is often caught in the middle of what should be nothing but a dispute between a landlord and tenant as to the allocation of the proceeds of a condemnation award. *State v. Texaco, Inc.*,[34] is such a case.

In this case, the court of appeals reversed a judgment of the Shelby County Circuit Court for the defendant-sublessor in the action to condemn its leasehold interest in a service station. The owner of the reversionary interest had accepted an award of $61,750 and the sublessee of the defendant had accepted $1,200. The defendant refused an offer of $1,200 and in the action in the circuit court received a verdict for $8,941. The court of appeals, in reversing, held that the trial judge had committed error in refusing to charge the jury that defendant's leasehold interest had to be considered as an integral part of the fee in the land and that the sum of the value of the divided interest in the land could not exceed the value of an unencumbered fee.

It is interesting that while holding to the well-established rule as to damages the court of appeals recognizes that considered from the point of view of separate interests the value of the land might well be held to be greater than when viewed as an unencumbered fee. The case proves again that the modern lease should provide in advance a method for allocating such award should the contingency of a condemnation of the land occur. Certainly this would eliminate much of the litigation and relieve the courts of a very difficult problem.

In an earlier case involving somewhat the same point, the supreme court reversed[35] a decision of the court of appeals affirming a judgment of the Madison County Circuit Court for defendants in a condemnation suit. The state had condemned defendants' land on which a service station was situated. The supreme court held that the instructions given by the trial judge were erroneous and confusing and could have resulted in the jury adding the value of the leasehold to the value of the unencumbered fee in arriving at total damages.[36]

34. 354 S.W.2d 792 (Tenn. App. W.S. 1961).

35. Moulton v. George, 208 Tenn. 586, 348 S.W.2d 129 (1961).

36. In State v. Texaco, Inc., *supra* note 34, the court of appeals cited the *Moulton* case for the proposition that the value of a leasehold must be considered as an integral part of the total value of an unencumbered tract of land.

In instructing the jury to find the value of the leasehold for purposes of allocating the award between lessor and lessee, the court said that it must be made clear to the jury that the value of the leasehold and incidental damage thereto must be deducted from the value of the fee and incidental damage thereto.

C. *Measure of Damages for Diversion of Stream*

In *Evans v. Wheeler*[37] the supreme court affirmed the court of appeals and the Chancery Court of Davidson County in their holding that the landowner was not entitled to damages for the taking of a stream by diversion thereof when as a result of such diversion it made the landowner's property more valuable for its highest use or purpose, a subdivision.

D. *Determination of Area of Land Condemned*

In *State ex rel. Moulton v. Blake*[38] the court of appeals affirmed a judgment of the Knox County Circuit Court awarding the defendant-landowner compensation for half an acre of land which was not included in the description of the premises in the deeds through which he claimed title. The award was based on the court's determination that the land had been enclosed by the defendant's fences since 1940 and that the locations of the fences had been agreed upon by adjoining owners who had not complained during the entire period. Under such circumstances, it would appear that the state would have to show that it might eventually have to pay the holders of the record title to this extra acreage in order to avoid payment to the defendant. While the facts appear clear enough to support the decision, it can be questioned in that it certainly has no binding effect on the holders of the record title who are not parties to the proceeding.

E. *Liability of City for Land Condemned Within Its Boundaries*

In actions by several landowners against Bradley County and the City of Charleston, the supreme court, in an opinion by Judge Felts, affirmed the Circuit Court of Bradley County in so far as it gave judgment for the landowners against the defendant county but reversed in so far as it had sustained a demurrer of the city to the action and had dismissed the city as a co-defendant.[39]

37. 209 Tenn. 40, 348 S.W.2d 500 (1961).
38. 357 S.W.2d 836 (Tenn. App. E.S. 1961).
39. City of Charleston v. Ailey, 357 S.W.2d 339 (Tenn. 1962).

The state had agreed to build a road through Bradley County, a portion of which ran through what is now the City of Charleston. The county had agreed with the state to pay for the right-of-way, including the portion in Charleston. Later, the city acknowledged its obligation to pay for the portion inside the city limits and entered into an agreement with the county to borrow the money from the latter and repay out of gas and sales tax returned to the city by the state. Thereafter, the state took the land but no one paid the owners and they brought this action to recover. The county argued that the incorporation of the city prior to the construction of the highway relieved it of liability for procuring the right-of-way inside the corporate limits of Charleston. Judge Felts quite properly held that the county had brought itself within the scope of certain sections of the statutes and was liable to the plaintiffs for the value of the land taken and incidental damages. Incorporation of the City of Charleston did not relieve the county of its liability. But the Judge correctly pointed out that by its agreement the city also became liable to the owners for the value of the land and the incidental damages caused by the taking.[40]

IV. Landlord and Tenant

Many writers who have examined the Tennessee cases over the years have concluded that the possibility of a purchaser's recovering from a vendor in tort for injuries sustained as the proximate result of a defective condition in the premises at the time of purchase was remote if, in fact, not non-existent. Happily, the supreme court in the case of *Belote v. Memphis Development Co.*[41] has decided there is at least one exception in this jurisdiction to the general rule that the doctrine of *caveat emptor* applies as between vendor and vendee to any proposed liability after a vendee has purchased real estate from a vendor.

In the *Belote* case a member of the purchaser's family fell through a covered opening in the attic shortly after the purchasers had gone into possession under the contract of sale. Following what he thought was the rule in *Smith v. Tucker*[42] the trial judge sustained a motion

40. Third-party beneficiary principles seem clearly to support holding the city liable on the facts of the instant case, and Judge Felts obviously had this in mind when he referred in his opinion to the agreement of the city with the county to compensate the landowners for the land taken and damage incident to such taking. To the extent it is implied that the liability of the municipality is statutory some doubt can be cast on the validity of the opinion. The case of Wood v. Foster & Creighton Co., 191 Tenn. 478, 235 S.W.2d 1 (1950), cited by Judge Felts, involved a fact situation considerably different from the one in the principal case.

41. 208 Tenn. 434, 346 S.W.2d 441 (1961).

42. 151 Tenn. 347, 270 S.W. 66 (1925).

by the defendant for a directed verdict at the conclusion of the plaintiff's proof. This holding was affirmed by the court of appeals. The supreme court reversed, deciding that on the facts there was a question for the jury as to whether or not the vendor in this case had failed to disclose a dangerous condition known to him, where he should have realized that the vendee could not know and probably would not discover the condition or its potentiality for harm.[43]

While this step toward imposing some liability on a vendor for selling premises to a vendee in an inherently dangerous condition is a cautious one, it is most welcome. All who have had occasion to examine the cases carefully have been distressed at what appeared to be an unjustified emphasis on the nature of the relationship between the parties in determining whether or not an injured person could recover for his injuries. The supreme court in the *Belote* case denies that the relationship is important where a purchaser, be he tenant or vendee, sustains injuries due to a dangerous condition in the premises.[44]

In *Grizzell v. Foxx*[45] a judgment for a tenant against her landlord was affirmed by the Court of Appeals for the Eastern Section. The suit resulted from injuries sustained by the tenant when she fell on snow and ice while walking on a common passageway between her apartment and the garage. The evidence established that the snow and ice had been allowed to accumulate for several days prior to the injury to the tenant. The important question discussed in the case is whether or not a landlord has a duty to remove the natural accumulation of snow and ice from a common passageway. Recognizing that there is a split of authority in this country on the question, the court adopted the view that there is such a duty although it is indicated that the landlord would be given a reasonable time for the removal of such snow and ice. The court quite justifiably regarded the case as falling within the scope of the developed rule in Tennessee that the landlord has the duty to exercise reasonable care to keep common passageways in good repair and in a safe condition where the landlord has leased premises to different tenants and the common approaches and passageways are reserved by the landlord for use in common by the tenants.[46]

In *Great Atlantic & Pacific Tea Co. v. Lyle*,[47] the Court of Appeals

43. 208 Tenn. at 438, 346 S.W.2d at 444.

44. The court states: "In other words, the principle under which this exception is based is not upon any relationship whatsoever, whether vendor and vendee, landlord and tenant or whatnot, but on the rights and duties of man to man." *Id.* at 440-41, 346 S.W.2d at 443-44.

45. 48 Tenn. App. 462, 348 S.W.2d 815 (E.S. 1960)

46. *Id.* at 468, 348 S.W.2d at 817.

47. 351 S.W.2d 391 (Tenn. App. E.S. 1961).

for the Eastern Section had occasion to review a judgment in favor of the plaintiff, a business invitee, for injury sustained when she stepped into a depression in defendant's parking lot and fell. The court discussed the distinction between actionable and trivial defects in premises and stated the test to be "whether the defect constituted a danger from which injury might be reasonably anticipated under all the circumstances and conditions."[48] On the facts, the court was satisfied that this was at least a jury question and judgment for the plaintiff was affirmed.

A. Liability of Landlord for Injury to Employee of Tenant Due to Defective Condition of Premises

In *Browning v. St. James Hotel Co.*,[49] a landlord who was under a contractual duty to furnish and maintain an air-conditioning unit and janitorial services obtained a directed verdict in an action brought by an employee of the tenant who slipped and fell at a spot where the air-conditioning unit had leaked water on the tenant's office floor. The facts indicated that the defendant landlord had been notified of the defective operation of the equipment and had attempted to make repairs. The court of appeals felt that on such facts there were grounds from which a jury could conclude that defendant had breached a duty to plaintiff. There were additional grounds for reversal in the erroneous holding that on the facts the plaintiff was guilty of contributory negligence as a matter of law.

The interesting point from the view of landlord and tenant law is that the court is apparently committed to the proposition that a tenant's possession does not necessarily insulate the landlord from liability to third persons.[50] Certainly there is no intimation that the contractual duty of the landlord to the tenant alone would be enough to impose a duty to third persons, but where after notice of a defect has been given the landlord and he has attempted repairs ineffec-

48. *Id.* at 396.

49. 355 S.W.2d 462 (Tenn. App. E.S. 1962).

50. The rule which developed at common law would severely limit the liability of the landlord in tort to persons injured due to a defective condition of the premises and in particular to the tenant or an employee or member of the tenant's family. See Harris v. Lewistown Trust Co., 326 Pa. 145, 191 Atl. 34 (1937) for a case stating this rule forcibly and indicating that at most a landlord would be liable for breach of duty to make repairs, the measure of damages ordinarily being the cost of making such repairs. But for language which would extend this common law liability see Bowles v. Mahoney, 202 F.2d 320, 326 (D.C. Cir. 1952) (dissent of Bazelon, J.), *cert. denied*, 344 U.S. 935 (1953); "[I]t follows that, at least in the absence of an express provision to the contrary, a landlord who leases property should be held to a continuing obligation to exercise reasonable eare to provide that which the parties intended he should provide, namely, a safe and habitable dwelling. . . ."

tively, then there is a solid basis for imposing tort liability on the landlord.

B. Right of Landlord To Enforce Forfeiture Clause

Wooldridge v. Robinson,[51] was an action by a lessee to enjoin the landlord from interfering with his collection of rent from a sub-leasee. The complainant-lessee was in default some four months on his rental payments and the defendant landlord demanded that payment of the amount due be made in three days. The complainant-lessee, eleven days later, did tender the rent and defendant refused to receive it stating that he had already exercised his right to declare the lease cancelled for failure to pay under the forfeiture clause in the lease. The lessee then paid the money into court and asked for an injunction which was granted. Defendant-lessor's motion to dissolve such injunction was subsequently denied. The court of appeals affirmed the holding of the chancellor that the notification by the defendant-lessor of his election to cancel the lease, which was communicated only after lessee had tendered the overdue rent, was too late to be effective.

The case turns primarily on the construction of the particular forfeiture clause in the lease which was interpreted so as to require the landlord to make a demand for rent due as a condition precedent to enforcing the forfeiture provision. One might quarrel with that construction of the clause involved but there is some comfort in the court's recognition of the fact that a landlord could have exercised his right to re-enter which certainly would have terminated the lease. This opinion would seem to make it imperative for attorneys representing landlords to examine carefully the forfeiture or cancellation clauses in the leases of their clients.

51. 352 S.W.2d 238 (Tenn. App. W.S. 1961).