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Real Property -- 1961 Tennessee Survey

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REAL PROPERTY—1961 TENNESSEE SURVEY*

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I. TITLES AND DEEDS—CONSTRUCTION—VALIDITY OF RESTRAINT ON MARRIAGE CLAUSE

Probably no area of the law is fraught with more confusion than that involving construction of clauses in deeds and wills which impose some restraint on the conduct of grantees or devisees seemingly not in the best interest of society. Clauses which tend to deter grantees or devisees from marriage or remarriage have constituted a fertile source of litigation for centuries. And though the stated rules of law prohibit and restrict the use of marriage or remarriage as a condition to vest or divest interests in real property, there are very few cases in which the courts in this country or in England, when uncontrolled by statutes, have reached unqualified decisions against the legality of general restraints on marriage. This general result is fully supportable on principle. Unfortunately, however, the tendency of courts faced with construing such clauses has been to search for precedents; usually they have not been amenable to an independent and thorough analysis of underlying policy nor of the purpose and intent of grantors and testators in attempting such restraints.[1] We now have, as a result of

*Although a number of cases involving questions in the area of real property were decided during the survey period, some of them were assigned to writers of other survey articles and have been examined in excellent fashion by the writers of those articles. They will not, therefore, be discussed in this section. See particularly Smedley, *Equity—1961 Tennessee Survey*, 14 VAND. L. REV. 1281 (1961) and Trautman, *Decedents' Estates, Trusts and Future Interests—1961 Tennessee Survey*, 14 VAND. L. REV. 1253 (1961).

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1. Many of the decisions involving restraint on marriage clauses and much of the writing on this subject reveals the strong desire to set up some kind of mathematical formulae for dealing with such clauses. Ordinarily, for example, it is assumed that a total restraint of marriage is void and that a partial restraint is valid only if reasonable. In fact, the court in Harbin v. Judd, 340 S.W.2d 935 (Tenn. App. M.S. 1960) gave lip service to this general principle. An examination of authorities should be required reading for all students of the law. The following are recommended as being most helpful: 6 AMERICAN LAW OF PROPERTY ch. III (Casner ed. 1952); 6 POWELL, REAL PROPERTY §§ 850-53 (1958); RESTATEMENT, PROPERTY §§ 424-38 (1944); Brow-

the decision in *Harbin v. Judd*,[2] a substantial holding in this jurisdiction that should do much to bring order out of the confusion which has heretofore existed in this area of the law.

In *Harbin v. Judd* the court was confronted with the problem of construing the following clause contained in a deed to property which was in the chain of title of land involved in an action for partition and sale. Distribution of the proceeds of the sale depended upon the effect of the following clause:

> Second: Upon the marriage of any of said beneficiaries or equitable owners, his or her interest shall vest in and become the property equally of the unmarried sisters or sister, during her or their unmarried state, but upon the marriage of the last unmarried sister, the property shall vest or re-vest in all of the aforesaid beneficial or equitable owners, in the said proportions or percentages stated; and this trust shall cease and terminate and said beneficial owners shall become the legal as well as equitable owners in the proportions stated in fee without conditions, limitations or restrictions.[3]

The chancellor in the partition action had held that this provision divesting the interests of the beneficiaries named in the deed was one involving a general restraint against marriage and therefore void. The court of appeals, in a decision by Judge Humphreys, sustained the assignment of error and held the restraint valid.

After acknowledging the general rule prohibiting total restraints on marriage, Judge Humphreys proceeded to interpret the clause as falling within one of the well-recognized qualifications of the rule. The clause as construed was held to involve a conditional limitation and not a condition subsequent which placed it without the scope of the rule. Assuming that the analysis on this point is accurate, there was ample authority in Tennessee and elsewhere to support the result.[4] The distinction drawn by Judge Humphreys is the most widely accepted qualification to the rule prohibiting restraints on marriage and one supported by a vast quantity of authority.[5]

Without going into an analysis of the particular clause in question to determine whether or not it was properly construed to involve a conditional limitation rather than a condition subsequent, it is to be hoped that the alternative grounds for the decision, as stated by

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der, *Conditions and Limitations in Restraint of Marriage*, 39 MICH. L. REV. 1288 (1941); Schnebly, *Restraints Upon the Alienation of Legal Interests*, 44 YALE L.J. 961, 1186, 1380 (1935).

2. 340 S.W.2d 935 (Tenn. App. M.S. 1960).

3. *Id.* at 936.

4. Hughes v. Boyd, 34 Tenn. 511 (1855) and other authorities cited in the opinion.

5. Note citations in: 6 AMERICAN LAW OF PROPERTY § 27.14 (Casner ed. 1952); 6 POWELL, REAL PROPERTY § 853 (1958); 4 THOMPSON, REAL PROPERTY § 1882 (1961); 35 AM. JUR. *Marriage* § 258 (1941).

Judge Humphreys, will be used to determine the validity of such clauses in the future. Because it is such an important contribution in an area of confusion, the language of the court is set out at length as follows:

> We believe we must determine the reasonableness of restraint, not alone upon the terms of the provision as urged by appellee, but the relation of the parties and the *purpose for which the restraint was imposed,* and the facts surrounding the imposition of the restraint must be taken into consideration.[6]

When this approach was used, it appeared obvious that the parties to the deed had no intent or desire to prevent marriage of any of the beneficiaries. Their purpose was clearly established as being to provide a home for the beneficiaries which could not be disturbed or broken up by the subsequent marriage of one or more of them.

The decision in *Harbin v. Judd* is a fortuitous one in the opinion of this writer. It provides the courts in this state with a guide which can be logically and consistently applied in an area heretofore marked with frustration and confusion. Though it is recognized that valid arguments exist to the contrary, the policy of the law would seem to be best served by making the validity of restraints on marriage turn on the purpose or intent with which such clauses are used. To make validity turn on the form in which the restraint is couched emphasizes form over substance, permits the careful draftsman to defeat the underlying social policy of the law and leads courts to make distinctions where none in fact exist. Where there is no intent or purpose to restrain a beneficiary, grantee, devisee or legatee from marriage, it is quite unlikely that his conduct will be greatly influenced by a clause where restraint is imposed for other desirable purposes.

II. Vendor and Purchaser

The legal effect of a retention by the vendor of payments made by the vendee under a contract for sale was in issue in *G. H. Swope Building Corp. v. Horton.*[7] In this case, the vendor sued the vendee for damages resulting from the vendee's refusal to purchase. This constituted a breach of his contract with the plaintiff.

The contract for sale, after acknowledging receipt by the plaintiff of $250 to be credited on the purchase price, contained the following language:

> Should I [vendee] revoke or withdraw this offer or refuse to carry out its terms, then the owner may at his option, (1) retain the sum of money

6. 340 S.W.2d at 939. (Emphasis added.)
7. 338 S.W.2d 566 (Tenn. 1960).

> deposited which I agree shall constitute liquidated damages for my failure or refusal to abide by the terms of the offer, or (2) proceed to enforce his legal rights, if any.[8]

The plaintiff had retained the deposit alleging in his complaint that he would credit it to any sum he might recover in the action for breach of contract. The defendant demurred and plaintiff asked leave to amend by striking the allegation above referred to and inserting in lieu thereof that, pursuant to the contract, the $250 had been deposited with a real estate broker in part payment of his commission. The proposed amendment requested the real estate broker be made a party so that rights as to the $250 could be fully determined.

The chancellor denied permission to amend and the plaintiff vendor appealed. The supreme court, in an opinion by Tomlinson, affirmed the chancellor's denial of permission to amend even though Tennessee Code Annotated section 21-108 on its face would appear to permit amendment at that stage of the proceeding.

The action of the vendor in this case is construed as constituting, in law, an election to retain the deposit. The court did not believe that the vendor's act of putting the $250 in the hands of a third person could materially affect his rights under the contract of sale. The language used in the contract provided for alternative remedies in event of default by the purchaser and the vendor could not avail himself of both of them. Having elected to retain the deposit as liquidated damages, he could not then pursue any other action as a result of the vendee's breach. The court cited one Tennessee decision[9] as tending to support the result and then argued that it was also strongly supportable on principle. It is difficult to conceive of any other result being reached in the face of the express language of the contract. Without such language, however, the retention by the vendor of payments made under the contract would not necessarily bar other actions by him based on the vendee's breach.

III. EMINENT DOMAIN

The current significance of the law of eminent domain is illustrated by two cases decided by the supreme court during the survey period. It is reasonable to expect that our courts will continue to be flooded by eminent domain actions and that many of them will find their way to the supreme court in an attempt by parties to clarify the law in a rapidly developing area. The law of eminent domain is in many respects ancient, but it is not fully understood or appreciated by

8. *Id.* at 567.
9. Thompson v. Exchange Bldg. Co., 157 Tenn. 275, 8 S.W.2d 489 (1928).

many attorneys and the average layman who finds himself a defendant in a condemnation action often is unhappy with the outcome. Much of the unhappiness flows from arbitrary and thoughtless acts of those administering the statutes providing the procedures to be followed in the taking of private land for public use. In fact, after reading all of the reported cases in Tennessee on this subject, the writer is convinced that much of the litigation could have been avoided with a little more patience and foresight on the part of the administrators. But not all of it, for some individuals just do not like the idea of giving up their "castles" to the "government" and many are just plain greedy. A combination of these factors assures us that the volume of litigation will not diminish. In view of the expanding character of governmental activities it will, in fact, increase.

In *State v. Williams*[10] the Tennessee Supreme Court considered the authority of the commissioner of highways, proceeding under applicable Tennessee statutes and federal laws, to designate certain highways as "limited-access" highways and to limit access to such a highway to certain specified points. In the instant case, the commissioner had so designated a highway and had caused a fence to be erected along the boundary of the project, which fence barred defendant from exercising a claimed easement of way which the highway crossed. Defendant had resorted to self-help by cutting the fence and crossing the limited access way which made his walk to the mailbox shorter and also provided a closer route for his children to the school bus stop and for the doctor to defendant's home. The commissioner sued to enjoin any further such acts and obtained a temporary injunction granting such relief. The defendant by answer and cross-bill sought to enjoin the commissioner from maintaining the fence across his alleged easement of way and the chancellor then modified the injunction so as to permit defendant to use his claimed right of way. The commissioner was enjoined from erecting the fence. His demurrer was overruled and a discretionary appeal allowed. The appeal from modification of the temporary injunction was denied whereupon the commissioner petitioned for certiorari and supersedeas which was granted by a member of the supreme court. After a hearing, the opinion of the court written by Justice Burnett reversed the chancellor and granted the injunction prayed for by the commissioner. The commissioner's demurrer to the cross-bill was sustained and that action dismissed.

The decision contains strong language as to the extensive power of the state, acting through its authorities, to control access to highways. Citing with approval Tennessee Code Annotated section 54-2003, the

10. 343 S.W.2d 857 (Tenn. 1961).

opinion concludes that such determinations of design are final. The extent to which the court would go in sustaining action by the highway authorities is indicated by the following language:

> We will take judicial knowledge of the fact that such highways are being constructed now from one end of the country to the other . . . . The courts without exception have thus held that it is the right of those of the State and Federal governments in constructing such highways to control these access facility roads for entrances or for crossing these highways . . . . The mere fact of controlling these entrances and exits at certain places is for the public welfare and safety of the traveling as well as the pedestrian public.[11]

In the instant case, the court pointed out that the defendant could proceed against the county under a reverse condemnation action as provided for in Tennessee Code Annotated sections 23-1423 and 1424 to recover damages for the cutting of his right-of-way. In short, all defendant is entitled to is compensation for the interest taken and he can get it under the statutory method. The court has made it clear that they will not interfere with or review decisions of the commissioner locating and constructing limited access highways or require him to build an access way in a manner he does not deem best. Further, they will protect the exercise of such discretion by the commissioner with the injunctive process.

In *Strasser v. City of Nashville*[12] the supreme court in an opinion by Justice Tomlinson affirmed Chancellor Lentz of Davidson County in his decision granting defendant's motion to dismiss the chancery action. The complainant was asserting via declaratory judgment the right of a condemnee to enjoin the continuance of condemnation proceedings in the law court. It was held that complainants had an adequate remedy at law either in the pending action by the highway commissioner to acquire some 80 acres of defendant's farm for highway purposes and/or by reverse condemnation action against the city if the taking of a "clear zone" for airport purposes was not fully compensated for in the highway condemnation.

One suspects that before there is an end to the litigation over petitioner's farm that many more chapters will be written. The land being condemned for highway purposes by the state department of highways is admittedly valuable land, located in an area being rapidly enveloped by an expanding community. In addition, it is somewhat anomalous, from the landowner's point of view, that the very land which is being condemned in fee is also within the "clear zone" of a new jet runway recently completed at the municipal airport. There

11. *Id.* at 859.
12. 336 S.W.2d 16 (Tenn. 1960).

is no question about it, Strasser is in a bind and there is little he can do about it. Obviously, if the condemnation action by the highway department is successfully concluded, the landowner will have lost the fee and with it any right to compensation for use of the airspace above it. He will, of course, still be able to hold the airport authority for any damage to land not taken for highway purposes.

It is pure speculation, but not illogical, to say that the landowner would have netted far more had the condemnation of a "clear zone" preceded condemnation of the fee for highway purposes. But it does not mean, as the decision of the court implies, that the owner will not be fully compensated for what is taken. Much as he might have desired a reversal of the order of taking, it cannot be accomplished via chancery. It looks as if the city taxpayer may be the happy beneficiary of planned or unplanned delay by the city in instituting condemnation proceedings for the clear zone at the end of the new jet runway. An interesting question as to the time of taking would have been presented had the land owner instituted his action for reverse condemnation against the city at the time lengthening of the runway began.

IV. Landlord and Tenant

It is common practice to include in a lease of real property a clause giving the landlord a right to claim a forfeiture of the tenant's interests under certain specified circumstances. The typical clause will cover non-payment of rent, failure to pay taxes or keep premises insured and, quite commonly, the failure of the tenant to occupy and keep the premises in good repair. Such clauses are usually framed so as to give the landlord the right to enter the property. Rarely is it desirable to provide for an automatic forfeiture. The landlord, in short, desires flexibility as to the course of action he can pursue and the automatic, special limitation type of forfeiture clause tends to shift control to the tenant. The landlord, under one of these clauses, is often in a vulnerable position because of the tendency of equity to relieve the tenant except where breaches of the lease are "substantial." Oftentimes a landlord finds that his failure to act promptly in asserting his rights under such a clause constitutes a "waiver" or in some instances an "estoppel." In the case of *Chapman Drug Co. v. Chapman*,[13] we have an example of a landlord failing to pursue in timely fashion his right to forfeit for breach of a lease by the tenant and this even though the alleged breaches constituted acts in the nature of waste.

The *Chapman* case could well have been discussed with the vendor-

13. 341 S.W.2d 392 (Tenn. 1960).

purchaser material above; the question in the case was resolved by holding that on exercise by a tenant of an option to purchase, the law of vendor and purchaser applies and the landlord-tenant relationship terminates. The case is another example of many where the key to problem solving in the law of vendor-purchaser is the doctrine of "equitable conversion." In short, the doctrine means that when an enforceable contract for the purchase and sale of realty exists, the purchaser is regarded from that time in equity as the owner and the vendor holds the bare legal title as security for the unpaid portion of the purchase price. The conversion is of the vendor's land ownership to personalty and the purchaser's contract right into realty. Following the theory to logical conclusions has been a favorite exercise of lawyers and judges for generations. It is this conceptual type of thinking which is oftentimes criticized[14] but nonetheless determinative of many issues. In the instant case, there is little reason to criticize the method or result. Unfortunately, this is not always true.[15]

In the *Chapman* case, the lease involved contained an option to purchase which the court found as a fact had been exercised by the lessee in accordance with its terms. Subsequent to the exercise of the option by the lessee-defendant, the landlord-plaintiff instituted this action to void the lease and for possession and damages. The basis of the action was wasteful acts allegedly committed by the defendant prior to the exercise of the option. The defendant demurred to the action alleging specifically that by exercise of the option the equitable title to the property passed to the defendant subject only to payment of the agreed purchase price. This demurrer was overruled and a discretionary appeal allowed. The supreme court, in an opinion by Tomlinson, reversed the decree of the chancellor and held that exercise by defendant of the option to purchase in the lease changed the relationship of plaintiff and defendant from landlord and tenant to vendor and purchaser. It appears that the court felt plaintiff's right was thereby limited to the agreed upon purchase price.

The view of the court that exercise of an option to purchase property terminates the landlord and tenant relationship and creates the relation of vendor and purchaser is supported by seemingly inexhaustible authority.[16] Certainly, the lessor cannot thereafter successfully urge a forfeiture of the lease for conditions imposed on the tenant by the lease where the acts complained of occur subsequent

14. See particularly the opinion of Cardozo in Hynes v. New York Cent. R.R., 231 N.Y. 229, 131 N.E. 898 (1921).
15. See Roady, *Real Property—1957 Tennessee Survey*, 10 VAND. L. REV. 1188, 1194 (1957).
16. See citations in principal case and in 1 AMERICAN LAW OF PROPERTY § 3.84 (Casner ed. 1952).

to an exercise by the lessee of the option. But it does not necessarily follow that he should not be permitted to assert a forfeiture based on acts of the lessee prior to an exercise of the option. In so holding the court seems to be doing either or both of two things: (1) applying some sort of estoppel or waiver against the landlord; (2) recognizing, in a left-handed way, the fiction of relation-back which has been somewhat discredited in the option cases by American decisions.[17] On principle, it is difficult to see how the landlord can complain. He had given the option voluntarily which (assuming other essentials) created a binding agreement. Breach of a covenant in the lease agreement, unless made expressly a condition precedent to the exercise of the option to purchase, would not normally deprive the lessee of his right to exercise the option. Nothing short of that, or a forfeiture or other termination of the lease for breach of covenants contained therein before exercise of the option, could defeat it. Here, the landlord, if he had grounds for forfeiting the tenant's interest, had not asserted them in timely fashion.

One further observation should be made. Finding that there has been an equitable conversion on exercise of the option does not in itself prevent the landlord-vendor from proceeding against his lessee-purchaser for waste. It is implicit that after the equitable conversion the interest of the vendor is similar to that of a mortgagee. It is basically a security interest. The vendee can commit acts of waste and a vendor would be entitled to relief in equity, perhaps even to the extent of foreclosing his vendor's lien. Admittedly, the acts of the vendee would have to be of a substantial nature for the cases indicate that relief would depend on the vendor showing that his security interest is impaired. This is not easy to do.[18]

17. *Ibid.* One can see that, after finding an equitable conversion on exercise of the option, that it might be helpful to then hold that the conversion relates back to the date when the option was given. The English court used this fiction in Lawes v. Bennett, 1 Cox 167, 29 Eng. Rep. 1111 (Ch. 1785) in determining who was entitled to the proceeds of a sale where the lessor died after executing the lease but before the option was exercised. Some American decisions have taken this view, particularly where a lessee after exercise claims a condemnation award or proceeds of an insurance policy carried by the vendor on the premises partially destroyed by fire. See, particularly, Cullen & V. Co. v. Bender Co., 122 Ohio St. 82, 170 N.E. 633 (1930) and Gard v. Razanskas, 248 Iowa 1333, 85 N.W.2d 612 (1957), noted in 9 SYRACUSE L. REV. 321 (1958).

18. 5 POWELL, REAL PROPERTY §§ 648, 649 (1956); 3 AMERICAN LAW OF PROPERTY § 11.32 (Casner ed. 1952).