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REAL PROPERTY—1960 TENNESSEE SURVEY

THOMAS G. ROADY, JR.*

* * *

I. TITLES AND DEEDS

1. Title Acquired by Partition Deed:—In a series of decisions stretching from 1901[1] to 1960[2] it has been established as a rule of law (not of construction) that a voluntary deed of partition passes no new title and creates no new estate but merely effects a severance of possession, whereby an estate theretofore owned jointly is thereafter owned in severalty. While it is the opinion of many conveyancers that this is an unfortunate development, one cannot quarrel with the court's application of it in *Johnson v. Beard* in the face of such strong precedents.[3]

The *Johnson* case is typical of those applying the aforesaid rule. Three daughters, who had inherited a tract of land from their father, agreed to exchange deeds with the obvious intent to sever the tenancy in common existent in the tract. The deed to one of the daughters, executed by the other two, named her and her husband as grantees. She died intestate in 1942 survived by her husband and several children. The surviving husband died in 1958 leaving a will

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1. Holt v. Holt, 185 Tenn. 1, 202 S.W.2d 650, 173 A.L.R. 1210 (1947); Manhatten Sav. Bank v. Bedford, 161 Tenn. 187, 30 S.W.2d 227 (1920); Cottrell v. Griffiths, 108 Tenn. 191, 65 S.W. 397 (1901); Samples v. Samples, 8 Tenn. App. 211 (E.S. 1928).

2. Johnson v. Beard, 332 S.W.2d 208 (Tenn. 1960).

3. This rule has been so vigorously applied that in Samples v. Samples, 8 Tenn. App. 211 (E.S. 1928), it was held that a husband named as sole grantee in a deed acquired no beneficial interest thereunder. On the facts it appeared that the deed was made as part of the voluntary partition of an interest of his wife. Therefore, he held the title in trust for her use and benefit and the title passed to the devisees named in her will.

in which he devised the land described in the partition deed to his second wife. She brought an action to determine her interest in the premises. The chancellor ruled that she acquired no interest because her husband had acquired no title by virtue of the partition deed to himself and his first wife. The supreme court affirmed the chancellor, referring to the partition deed rule as "a settled rule of property"[4] in this state.

It is to be hoped that on the next occasion on which the supreme court is confronted with the partition deed rule that it will analyze it and the fact situation carefully with a view to abandoning it is a rule of law. The rule is a court made (common law) one and developed at a time when there was considerable emphasis placed on the need for the four unities to establish joint estates in land.[5] During the period it has been applied, many developments in the law of property run counter to the arbitrary application of any rule of construction that tends to disregard the intent of the parties to an instrument.[6] It would seem to be time for the court to determine if there still exists any valid reason for continuing to apply the rule of the *Johnson* case. If there is not, it should be abolished. Rules arbitrarily applied, when they tend to defeat the intent of parties to an instrument, are unreasonable. There are few who honestly believe that the partition deed rule does other than defeat the intent of the parties to a deed.[7]

Certainly it would seem that the court can escape the rule whenever other than a man and wife are the grantees in the partition deed.[8] But they would have great difficulty, in view of the broad

4. 332 S.W.2d 208 (Tenn. 1960).

5. See the discussion in Holt v. Holt, 185 Tenn. 1, 202 S.W.2d 650 (1947) and cases and texts cited therein. See also Jones v. Jones, 150 Tenn. 554, 266 S.W. 110 (1924).

6. The legislature on at least two occasions has acted within recent years. TENN. CODE ANN. § 64-109 (1956) permits the creation of an estate by entireties by direct conveyance. TENN. CODE ANN. § 36-602 (1956) clearly indicates legislative sympathy with the creation of estates by the entireties. Much longer ago, the legislature of Tennessee abolished the Rule in Shelley's Case which had previously been arbitrarily applied to defeat the apparent intent of parties to an instrument. TENN. CODE ANN. § 64-103 (1956). In addition the courts of Tennessee have on numerous occasions shown a preference for tenancies by the entireties. Ballard v. Farley, 143 Tenn. 161, 226 S.W. 544 (1920); Bennett v. Hutchens, 133 Tenn. 65, 179 S.W. 629 (1915); Cole Mfg. Co. v. Collier, 95 Tenn. 115, 31 S.W. 1000 (1895). The courts have often been quite liberal in giving effect to the intention of parties and reluctant to follow arbitrary rules in construing this intent. See particularly Runions v. Runions, 186 Tenn. 25, 207 S.W.2d 1016 (1948); Dalton v. Eller, 153 Tenn. 418, 284 S.W. 68 (1926); Southern Ry. v. Griffitts, 304 S.W.2d 508 (Tenn. App. E.S. 1957); Higginson v. Smith, 38 Tenn. App. 223, 272 S.W.2d 348 (M.S. 1954).

7. To hold that a grantee named in a deed acquires no beneficial interest thereunder as a matter of law is palpably illogical. If all the parties have accomplished is a recognition of the marital rights of a spouse, as in the cases applying the partition deed rule, then why name them at all?

8. Jones v. Jones, 150 Tenn. 554, 266 S.W. 110 (1924).

language in which the rule has been stated in the past, to escape it where the grantees are husband and wife even though in the partition deed the intent to create a tenancy by the entireties was clearly indicated.[9] This emphasis on what once was a highly technical aspect of the law of conveyances is no longer justified. If the court will not abolish this rule, then they should at least point out the need for legislation when the next opportunity occurs.

2. Conveyance to a Public or Private Corporation Having Power of Eminent Domain:—It is a general rule that the interest or estate acquired by the condemnor in an eminent domain proceeding is only such as is required to accomplish the purpose which gave rise to the action. As a consequence, whenever it becomes necessary to determine the extent of the interest acquired in such a proceeding, all doubts and ambiguities are resolved in favor of the owner. The result of this rule limits the interest of the condemning authority to an easement if this is sufficient to enable it to carry out its purpose, and only where land is conveyed in fee by voluntary deed or when the fee is necessary to achieve the purposes for which the land is taken will the owner's interests be extinguished completely. This is contrary to the rule of construction in the ordinary voluntary conveyance which would allow the grantee the greatest interest possible.[10]

The rule developed in the eminent domain cases has had an impact on the construction of deeds, voluntarily executed, when the grantee therein has available the power of eminent domain but has not used it. The ordinary rule of construction favoring the grantee is not followed as readily when the grantee in a deed is a public or private corporation possessing the authority to condemn.

A case illustrative of this point is *Lillard v. Southern Ry.*[11] In this case the supreme court, in an opinion by Justice Prewitt, affirmed the Circuit Court of McMinn County in holding that the railway company had acquired only an easement or right-of-way in certain land rather than the fee. It is true that the language of the conveyance contained the term "right-of-way" but other language in the deed would appear to support a holding that a fee was acquired.

The authority in support of the court's holding is ample and respectable,[12] and cases which seem to give some support to a con-

9. "To A and B, husband and wife as tenants by the entireties, with right of survivorship." If this would not suffice, a straw man arrangement would be needed or a subsequent direct conveyance under TENN. CODE ANN. § 36-602 (1956) by the spouse who acquires the sole interest under the partition deed.

10. 6 NICHOLS, EMINENT DOMAIN 163-65 (1950).

11. 330 S.W.2d 335 (Tenn. 1959).

12. Southern Ry. v. Vann, 142 Tenn. 76, 216 S.W. 727 (1919); McLemore v. Charleston & M.R.R., 111 Tenn. 639, 69 S.W. 338 (1902).

trary result can be distinguished.[13] The moral to these cases is that whenever the grantee in a deed is a public or private corporation having the power of eminent domain special care should be exercised in describing the nature of the estate conveyed.

3. Champertous Conveyances:—The case of *Blair v. Gwosdof*[14] is another in a long series of decisions involving an application of the Tennessee statutes prohibiting champertous conveyances.[15] In this case the complainant was given a decree removing a certain deed as a cloud on complainant's title. The decision was sustained by the court of appeals where the facts appeared that the deed under which defendants claimed was executed while complainant was in adverse possession of the premises. Citing *Kincaid v. Meadows*,[16] Judge Felts construes the statutes as making "utterly void every sale or grant of land adversely held, without regard to the length of adverse possession and without regard to whether the vendor's title is valid or invalid."[17]

It is unfortunate that the statutes in this state on which such decisions as the instant one are based have not long since been repealed or modified. It is becoming more and more apparent that the courts cannot be expected to lessen the oftentimes arbitrary and seemingly unjust result which flows from the literal application of these statutes. The instant case would have been an excellent one in which to permit the defendant to establish the title of his grantors on the merits. But in spite of the desirability of relaxing the rigorous enforcement of such statutes,[18] the court continues to regard possession at the time of the disputed conveyance as determinative of a deed's validity, even though the grantor in such deed might have had the legal title at the time it was executed and delivered.

II. EMINENT DOMAIN

Three cases involving the Tennessee law of eminent domain were decided during the survey period. One of them was by the Supreme Court of Tennessee and two were federal court cases.

In *Hopper v. Davidson County*[19] the supreme court reversed the Circuit Court of Davidson County which had sustained a demurrer

13. Nashville, C. & St.L. Ry. v. Bell, 162 Tenn. 661, 39 S.W.2d 1026 (1931); Burnett v. Nashville & C.R.R., 36 Tenn. 528 (1857).
14. 329 S.W.2d 366 (Tenn. App. M.S. 1959).
15. TENN. CODE ANN. §§ 64-406, -407 (1956).
16. 40 Tenn. 188 (1859). Numerous other decisions are also cited in the opinion.
17. 329 S.W.2d 366 at 368.
18. For an excellent discussion of the statutes and Tennessee decisions see Trautman, *Real Property*, 6 VAND. L. REV. 1080 (1953); Trautman and Kirby, *Real Property—1954 Survey*, 7 VAND. L. REV. 921 (1954).
19. 333 S.W.2d 917 (Tenn. 1960).

by the county to plaintiff's action to recover damages for the taking of private property and had denied the petition of plaintiff to amend. While admitting that the declaration had been poorly drawn, Justice Burnett pointed out that plaintiff had obtained different counsel who requested permission to amend. He further pointed out that a favorable ruling on this petition would not have permitted any unfair advantage to be taken of defendant. The supreme court was reluctant to reverse the lower court in a matter normally regarded as discretionary with a trial judge but in this instance it was felt that an injustice would be done if such action was not taken.

It appears that the lower court had thought that the action of trespass for damages as brought would not lie. The supreme court thought otherwise and cited section 23-1423 of the Code in support of its position.[20]

The case is significant in that there is spelled out in the opinion the measure of damages due a lessee when his property is taken by condemnation proceedings.[21] While this point was not in issue, the statement should be helpful on further proceedings.

In *Hicks v. United States*[22] the court of appeals awarded the condemnee $15,090.00 with interest at 6 per cent per annum on the portion of the award not previously paid into court from the date of the taking of the property by the Tennessee Valley Authority. The commissioners had disagreed on the amount of the award, the majority determining the damage to be $14,500 and a minority (the third commissioner) placing the figure at $7,985. On exceptions being filed to the award and a hearing de novo before a three judge court waived, the district judge for the Middle District of Tennessee entered a judgment reducing the award to $7,500. The court of appeals in considering the entire record "without regard to the awards or finding theretofore made by the commissioners or the district judges" came up with the above figure. In so doing, they took into consideration: (1) testimony as to erosion damage which would be caused by cutting of trees by TVA both within and without the appellant's property; (2) the fertility of the soil and the average production in past years; (3) testimony as to the detrimental effect that unsightly power poles would have over the entire tract of land; and (4) testimony as to the apprehension of danger to persons or

20. Emphasis is on that language in the code which permits the owner to initiate an action by certain prescribed procedure, "or he may sue for damages in the ordinary way. . . ." TENN. CODE ANN. § 23-1423 (1956).

21. "Generally speaking, a lessee is entitled to compensation for fixtures, structures, or other improvements installed or erected by him upon property taken under eminent domain, if, as against the lessor, he has the right to remove such improvements prior to or upon expiration of his term." 333 S.W.2d at 920.

22. 266 F.2d 515 (6th Cir. 1959).

property caused by the presence of power lines on the land.

"In determining the question whether or not property already devoted to public use can be subjected to the power of eminent domain, the primary factor to be considered is the character of the condemnor."[23] The case of *United States v. Certain Parcels of Land in Knox County, Tennessee*,[24] decided during the survey period, clearly supports this conclusion.

It was urged by a cemetery corporation, one of the defendants in the proceedings, that the State of Tennessee did not have the power to acquire through condemnation lands previously dedicated to cemetery use and to divert said lands to the construction of highways, and the United States could not, therefore, condemn such land for the purpose of conveying them to a political subdivision of the State of Tennessee. It was argued that such use of the land by the United States would not be a "public one" within the meaning of the fifth amendment.

The cases[25] cited by counsel for the cemetery were analyzed by the district judge in his opinion and issue taken with the construction of them given on behalf of defendant. The district judge interpreted them as standing for the general principle that property devoted to a public use, selected and set apart by legislative authority, cannot be taken for another and inconsistent public use in the absence of legislation expressly or impliedly warranting it. This seems to be an accurate view of such cases. This being the principle of law, the United States could condemn in this instance because in the Federal-Highway Act of 1956 Congress had expressly authorized the taking of land by the Secretary of Commerce.

All of the above was really unnecessary to the decision. For it has long been well established that a state or the United States for its own purposes can acquire property by eminent domain, the fact that the property sought having already been dedicated to public use imposing no restraint upon the power.[26]

III. MISCELLANEOUS

1. Adverse Possession:—In *Pyron v. Colbert*[27] complainant sought an injnnction to restrain his neighbor to the south from erecting a fence which would interfere with the use of a driveway. The driveway had been used as an entrance to and exit from complainant's

23. 1 NICHOLS, EMINENT DOMAIN 131 (1950).
24. 175 F. Supp. 418 (E.D. Tenn. 1959).
25. Southern Ry. v. City of Memphis, 126 Tenn. 267, 148 S.W. 662 (1912); Memphis State Line R.R. v. Forest Hill Cemetery Co., 116 Tenn. 400, 94 S.W. 69 (1906).
26. See cases collected 1 NICHOLS, EMINENT DOMAIN 132 n. 51 (1950) and cases cited in instant case at 422, 423.
27. 328 S.W.2d 825 (Tenn. App. W.S. 1959).

property. The chancellor dismissed the bill and the court of appeals affirmed the chancellor's judgment. On the facts, complainant had not made a case of any kind for that relief he requested. It appeared that the original use of such driveway was permissive to the extent that it encroached on defendant's premises and even if adverse, the period of time so used was too short to give complainant a prescriptive right therein. In holding that on the facts the complainant was not entitled to relief, the court observed that in no event could a complainant use the seven-year statute[28] when there was no color of recorded muniment of title since that statute is purely defensive in nature.[29]

2. Evidence of Title—Criminal Action:—Yates v. State[30] involved an appeal by certain defendants of their conviction in the County Court of Fentress County of a criminal trespass.[31] The basis for the appeal was that the State had failed to prove legal title to or possession of the land in the prosecuting witness at the time of the alleged trespass.

In the instant case, the timber defendants had cut was on unfenced and unoccupied land.[32] It was incumbent on the prosecution, therefore, to prove ownership within the meaning of the statute since they could not establish actual possession. The supreme court, in the opinion by Justice Swepston, said this could only be done in such circumstances by showing title in the prosecuting witness by deraignment from the state or from a common source. Since this had not been done, the convictions of defendants below were reversed.

There had been testimony introduced in the trial of defendants to the effect that the prosecuting witness had purchased the land from which the timber was cut and that subsequent to the alleged trespass he had executed a deed to the premises to his son. This was not sufficient evidence of title to sustain the action.[33]

28. TENN. CODE ANN. § 28-203 (1956).

29. On this point see Moore v. Brannan, 304 S.W.2d 660 (Tenn. App. M.S. 1957), 11 VAND. L. REV. 1373 (1958). See also Note, *Title By Adverse Possession in Tennessee*, 5 VAND. L. REV. 295 (1954).

30. 332 S.W.2d 186 (Tenn. 1960).

31. The statute allegedly violated was TENN. CODE ANN. § 39-4521 (1956) making it a felony ". . . knowingly, willfully, and maliciously to cut, or to remove for the purpose of marketing the same, timber from the lands of another, without the consent of the owner of the timber."

32. This fact serves to distinguish the case from Clark v. State, 131 Tenn. 372, 174 S.W. 1137 (1915) wherein the prosecuting witness was found to have constructive possession by virtue of his tenant's cultivation of a portion of the premises, and Deaderick v. State, 122 Tenn. 222, 122 S.W. 975 (1909) wherein the prosecuting witness was held to be in actual possession of the land from which the timber was cut.

33. The court on being confronted with the decision in Pepper v. Gainesboro Tel. Co., 1 Tenn. App. 175 (M.S. 1925) felt compelled to call it an unsound decision. That case contained the following language, ". . . parol evidence, unexcepted to, is some evidence upon which the jury predicated its verdict." 1 Tenn. App. at 178. But the two cases might be reconciled. The *Pepper* case was a civil action for damages while the instant case was a

3. Divided Interests—Waste:—One of the legal principles which is employed to keep in balance conflicting desires of persons having interests in the same land is known as waste. While the fact situations in which the problem of "waste" or "no waste" can arise are almost infinite in variety,[34] in the great majority of cases the alleged wrongdoer has either a possessory estate for life or a possessory estate for years. The action ordinarily is at the instigation of the holder of the future interest, in most such cases a reversion or a remainder.

In *Thompson v. Thompson*[35] a life tenant sought a declaratory judgment respecting her right to cut and sell certain timber on a farm. The remaindermen were the defendants.[36] The chancellor entered a decree that complainant could cut and sell for her own use and benefit certain cedar and oak timber during the existence of her life estate.[37] The court of appeals appears to have affirmed the chancellor in substance for the reason that they believed the instrument creating complainant's life estate, properly construed, made such estate unimpeachable for waste and that it was the intent of the testator that the life tenant be permitted to harvest suitable timber crops.

Justice Swepston's opinion indicates that the supreme court thought the court of appeals had misconstrued the decree of the chancellor. The higher court interpreted the chancellor as finding that the cutting of timber, subject to the limitations imposed in the decree, would be beneficial to the farm (interests of defendants?).

Of course, if the possessory estate is held "without impeachment for waste," a somewhat greater freedom of action is permitted in the

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prosecution for a criminal trespass. Certainly, in a criminal action, the court should insist that prosecuting witness prove beyond reasonable doubt that he has actual possession or a title which would carry with it constructive possession.

34. In 5 POWELL, REAL PROPERTY 5-45 (1958) there is an excellent discussion of the law of waste. After pointing out that the development of this phase of the common law started at or before the middle of the twelfth century and tracing it through the nineteenth century, Powell indicates his belief that the law of waste can best be understood by presenting it in varying combinations of four sets of variables: (a) the type of interests for which protection is sought—remainder, reversion or executory interest; (b) the type of interest had by the person against whom the protection is sought—life estate or estate for years; (c) the exact content of the act or omission as against which protection is asked—destructive or ameliorative; (d) the procedural channel through which protection is demanded—damages, injunction or declaratory judgment.

35. 332 S.W.2d 221 (Tenn. 1960).

36. There are very few cases where declaratory judgment is the procedure invoked to resolve one of these conflicts and this case appears to be one of the even fewer recent ones. The exact nature of the future interest held by defendants is not entirely clear. They are referred to as ". . . defendant Edd G. Thompson, individually and on behalf of his children as *possible* remaindermen. . . ." 332 S.W.2d at 223 (emphasis added).

37. It should be noted that the right to so cut and dispose of the timber was subjected by the decree to certain restrictions as to size and condition of the trees.

use of the premises than where such intent is not found in the instrument creating the divided interest. But even though such an intent is expressed, courts of equity have not been reluctant to interfere where acts of the life tenant are injurious to the reversion or remainder, and this is particularly true where such acts are wilful, wanton or malicious in nature. The hostility of courts to the finding of an intent to give the life tenant complete freedom in dealing with the premises is evidenced by language in the instant case which would deny a life tenant the unrestricted right to sell timber for a profit to those instances where "the language and the surrounding circumstances are reasonably clear in compelling a conclusion to that effect."[38] The view that the will involved in the instant case gave complainant a life estate without impeachment for waste does not appear to be a strained one, but it does not seem to be so reasonably clear as to "compel a conclusion to that effect."

However, after taking issue with the views expressed by the court of appeals on the above points, the court affirms on the ground that the cutting and selling of timber for the purpose of enhancing the value of the farm is not waste. This is certainly a rational approach and there was strong precedent for using it.[39]

One might pause to wonder why there could be any real question about the right of a life tenant to engage in any activity that would prove beneficial to the estate or would fall within the concept of "good husbandry" of the affected land. The ostensible reason is that the common-law precedents were decided in England, "a timber-scarce agricultural society."[40] This led to decisions limiting the cutting of timber by a life tenant quite severely. Fortunately, the trend has been away from the narrow approach of these English cases and a relaxation of the law of waste as applied to timber cutting has been accomplished by stressing an actual increase in the value of the inheritance caused thereby or by accepting the changes in the land affected in the interests of "good husbandry."[41]

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38. 332 S.W.2d at 226.

39. The cases of Lunn v. Oslin, 96 Tenn. 28, 33 S.W. 561 (1896) and Owen v. Hyde, 14 Tenn. 334 (1834) are landmark cases, the former being widely cited in other jurisdictions.

40. 6 POWELL, REAL PROPERTY 15 (1958).

41. The English decisions and many of the early ones in the United States forbade a tenant impeachable for waste to cut any timber save such as was needed for firewood, fences and building repair. The effect of the early common-law view is still felt in Tennessee even though the attitude portrayed in Owen v. Hyde and Lunn v. Oslin, *supra* note 39, is a liberal one. See TENN. CODE ANN. § 64-804 (1956) which states that "no person holding the temporary title to real estate, subject to redemption, shall use more of the wood growing thereon than the timber required to keep the improvements in good repair, and firewood necessary for those occupying the same. . . ." See also TENN. CODE ANN. § 67-1911 (1956) which prohibits the cutting and selling of timber on land subject to a tax lien, with certain exceptions.

IV. LANDLORD AND TENANT

Under what circumstances will a lessee be liable to his landlord for damages to buildings on the leased premises caused by the tortious act of a sublessee? This question was before the middle section of the court of appeals in the case of *Bishop v. Associated Transport, Inc.*[42] The court held the lessee for the destruction of the buildings caused by an act of arson of a sublessee. Judge Felts dissented without opinion.

Defendant, lessee, had leased the premises from the plaintiff, landlord, by executing a lease containing the following covenants the court thought relevant to the case: Clause Second, giving the lessee the right to sublet and assign the lease with a provision that it should not relieve the lessee of his obligations under the lease; Clause Third, providing that the lessor would make all structural and roof repairs with the lessee to be liable for all other repairs *"if the condition requiring repair has been caused by the negligence of the Lessee."* (Emphasis added.); Clause Ninth, providing for a surrender of the premises at the end of the term "in a reasonably good state of repair, ordinary wear and tear and *damages by fire* and the elements" being specifically excepted; Clause Tenth, providing that the lessee would not conduct any operations on the premises that would increase the rate for fire insurance and would comply with all laws affecting the demised premises.[43]

Subsequent to entering into this lease, the defendant sublet the property, as he had the right to do under Clause Second of the lease. Approximately a year later the sublessee deliberatly set fire to the buildings on the premises, and they were completely destroyed. For this act, the sublessee was convicted of arson.[44] The chancellor held the defendant liable on the theory that covenant nine of the lease had been violated. The court of appeals affirms this result. It is quite difficult to understand just what theory the court uses in so doing. Apparently the court felt that the lessee undertook an obligation by Clause Ninth to respond in damages for any loss by fire except "fire that occurred by accident or from conditions beyond the control of the lessee or sublessee. . . ."[45] It is difficult to escape the suspicion that the court really felt that the lessee's liability was in tort for a substantial part of the opinion is devoted to a discussion

42. 332 S.W.2d 696 (Tenn. App. M.S. 1960).

43. This clause would appear to indicate that the parties expected the lessor to keep the premises insured. Such a clause is often a basis for finding that destruction of the premises is a loss the parties contemplated would be borne by the landlord.

44. The landlord first sued the sublessee, obviously in tort, and recovered a judgment of $30,000 against him. Apparently the judgment could not be collected.

45. 332 S.W.2d at 700.

of the liability of a lessee for damages to premises caused by an intentional or negligent act.

As examples of the confusion that exists in the opinion, the court spends some time making the point that a covenant to keep the premises in good repair runs with the land. Of course it does! But of what relevance is that to this decision? Here the landlord is seeking to recover from his lessee with whom he is in privity of contract[46] and who had expressly covenanted in Clause Second to remain bound by this contract in the event of a sublease or assignment. Had the action been against the sublessee on the contract, then it would have been necessary to discuss the running covenant since the sublessee not having contracted with the original landlord could only have been held to the contract if in privity of estate with him.[47] Further evidence of confusion is the lengthy discussion concerning the effect of a clause excluding damage by "fire and the elements."[48] It is most certainly true that such an exclusion does not apply where the loss or destruction is caused by the negligence or misconduct of the lessee. But in what respect was the defendant lessee guilty of negligence or misconduct in this case? The negligence or misconduct was that of a sublessee and unless one can in some way impute this to the defendant the entire discussion is irrelevant. The sublessee was not an agent of defendant. Nor is there any evidence in the opinion to indicate that the defendant was negligent in selecting the sublessee who was guilty of the tortious act.

But the most difficult portion of the opinion to swallow is that which construes the exception of damage by fire of Clause Ninth in the following words:

> [W]e do not believe that the parties, by the provisions of the lease, intended to excuse the lessee from responsibility for fire which was intentionally set by him or his agent or by a sublessee, and which resulted in the destruction of the buildings on the property.[49]

The original lessee could not by contract avoid liability for an intentionally tortious act of himself or his agent. Numerous decisions indicate that this cannot be done.[50] But he could avoid liability for the acts of the sublessee or other third persons and it is reasonable

46. The lessee could not have escaped his contract obligations without a novation and nothing like that had occurred.

47. If only a sublease was involved in this case, the plaintiff would have had no action for breach of the running covenant, for the generally accepted view is that there is neither privity of contract or privity of estate as between an original landlord and a sublessee. This reinforces the belief that the action plaintiff had pursued against the sublessee was in tort.

48. 332 S.W.2d at 701.

49. *Id.* at 700.

50. See Annots., 45 A.L.R. 12 (1926), 20 A.L.R.2d 1331 (1951); see also LESAR, LANDLORD AND TENANT 349 (1957).

to believe he intended to do so.[51]

The short of it is that this decision seems to this writer to be an erroneous one, decided on some general equitable principle that as between a landlord and tenant, destruction of the buildings on the premises from a cause that never entered their minds should be borne by the tenant. For the result reached in this case cannot be explained simply in terms of construing Clause Ninth as not being effective to relieve the tenant from the obligation to surrender the premises at the end of the term in a reasonably good state of repair even though that clause contained damage by fire as an exception. It goes much further in that the court has in effect said either that the destruction of the buildings was in this case due to the neglect or fault of the defendant or that he *expressly stipulated* in writing to be bound for such destruction.[52]

51. Nor for that reason does it seem logical to assume that the original lessor intended this result. Lessor first proceeded against the sublessee guilty of the misconduct. The action against this defendant appears to be something of an afterthought.

52. TENN. CODE ANN. § 64-703 (1956). No precedent could be found for such a holding. A number of cases seemed to support a different result. See authorities cited *supra* note 50.