Vanderbilt Law Review

Volume 11
Issue 4 *Issue 4 - A Symposium on Motor Carriers*

Article 26

10-1958

Real Property -- 1958 Tennessee Survey

Thomas G. Roady, Jr.

REAL PROPERTY—1958 TENNESSEE SURVEY

THOMAS G. ROADY, JR.*

TITLES AND DEEDS

In *Bailey v. Eagle Mountain Tel. Co.*[1] the supreme court in an opinion by Justice Swepston affirmed the chancellor of Knox County who had sustained defendant's demurrer to a specific performance action because he regarded the following language in complainant's claim of title as creating a fee simple determinable in the grantee.

> In consideration of love and interest we have in Education, we this day deed, transfer, and convey a certain lot or parcel of land . . . . To have and to hold for school purposes . . . so long as the aforesaid lot of land is used for the aforesaid purpose.

As pointed out in the opinion, the language in this deed is that which has been traditionally used in creating a determinable fee. The authorities cited indicate this clearly.

It is good that we now have a clear-cut decision on the point raised by the case for many courts have been reluctant to find a defeasible fee created by language susceptible of any other construction. It is fair to state that the fee simple determinable is not a favorite of the courts for it operates quite harshly in abruptly terminating an interest of otherwise indefinite duration. The drastic nature of this automatic forfeiture has led courts to find conditions, easements, covenants, trusts, or expressions only of purpose or motive where language would seem to justify the determinable fee.[2]

But where as here the words of art "so long as" are used in the instrument without any other qualifying language it is impossible to resist the conclusion that an intent to create a determinable fee has been expressed. The only possibility of escaping this result is to hold, as petitioner urged, that the policy against the creation of such a defeasible estate is so strong that only the clearest indication of intent will be given effect and that such intent is not clear unless there is an express provision for a reversion.[3] This decision puts Tennessee squarely with jurisdictions that do not require an express reservation

* Professor of Law, Vanderbilt University; Faculty Advisor, Vanderbilt Law Review; Member, Tennessee and Illinois Bars.

1. 303 S.W.2d 726 (1957).
2. Rockford Trust Co. v. Moon, 370 Ill. 250, 18 N.E.2d 447 (1938); Bd. of Educ. v. Bd. of Educ., 292 Ky. 261, 166 S.W.2d 295 (1942); Dyer v. Siano, 298 Mass. 537, 11 N.E.2d 451 (1937); Board of Chosen Freeholders v. Buck, 79 N.J. Eq. 472, 82 Atl. 418 (1912); W. F. White Land Co. v. Christenson, 14 S.W.2d 369 (Tex. Civ. App. 1928). See Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land,* 54 HARV. L. REV. 248 (1940).
3. Post v. Weil, 115 N.Y. 361, 22 N.E. 145 (1889).

to the grantor of the possibility of reverter in order to create a determinable fee.[4] The possibility of reverter is a legal consequence of the estate itself and need not be expressed. A careful conveyancer, though, desiring to create such an estate will express the reversionary interest. This tends to eliminate completely the possibility of litigation.[5]

Easements: The question of when an easement can be created by implication was discussed during the survey period by the eastern section of the court of appeals in the case of *Line v. Miller*.[6] In this action the complainant's bill for injunctive relief against an alleged interference with a sewer line running from her lot across defendant's lot to a public main was dismissed by the chancellor of Knox County and the dismissal is affirmed by the appellate court. The court could find no easement on the facts in favor of complainant. There was, therefore, no interest of complainant meriting protection.

It is difficult to quarrel with the result reached in *Line v. Miller* for complainant had failed to establish a unity of title to the two lots at the time the sewer line was built.[7] But with all deference to the court, questions can be raised concerning some of the language in the case and with the use made of prior Tennessee opinions in support of such language. Heretofore, decisions in this jurisdiction have been quite good in analyzing the easement by implication problem. This decision tends to muddy the water.

All implications of easements necessarily involve an original unity of ownership of parcels which later become the dominant and servient estates. As to implications arising out of other than "strict necessity"[8]

4. Gray v. Blanchard, 8 Pick. 284 (Mass. 1829).
5. RESTATEMENT, PROPERTY § 44 (1936).
6. 309 S.W.2d 376 (Tenn. App. E.S. 1957).
7. The language used by the court on this point is somewhat unfortunate. It appears that the court feels this element of unity of title requires a complainant to show that it existed at the time he purchased his tract of land. The Court held that the ". . . complainant still cannot maintain the bill since there is no proof that her predecessors in title owned both lots when they conveyed Lot 13 [to her]." 309 S.W.2d at 377 (Tenn. App. E.S. 1957). This misses the mark. The rule generally applied is that an original unity of ownership of dominant and servient parcels must be pleaded and proved which requirement permits the establishment of such an easement based on facts of the distant past despite many intervening conveyances. This position has been approved by the Tennessee Supreme Court in Bowles v. Chapman, 180 Tenn. 321, 175 S.W.2d 313 (1943) and is supported by other authority. Finn v. Williams, 143 S.C. 223, 141 S.E. 375 (1927); Boles v. Red, 227 S.W.2d 310 (Tex. Civ. App. 1950); 3 POWELL, REAL PROPERTY 417 (1952); TIFFANY, REAL PROPERTY 546 (abr. ed. 1940); 2 WALSH, COMMENTARIES ON LAW OF REAL PROPERTY 583 (1947). This rule makes sense for the easement would come into existence at the time the so-called quasi-dominant and quasi-servient estate were separated by the common grantor. It would pass then to any subsequent grantee in the chain of title just as would an easement created in any other way, e.g., by contract, by express conveyance, by prescription, by estoppel.
8. The term "strict necessity" is used in describing the type of easement which is implied when a common grantor conveys to another a parcel of land that is completely surrounded by other land retained by the grantor and across which no right of way is expressly given. Such easements have been

it is essential that during the unity of ownership one portion of the premises be utilized for the service of another part, thereby creating what is referred to as quasi-dominant and quasi-servient tenements with a resultant quasi-easement.[9] Where there has been this unity of ownership and such use has been made so as to raise a quasi-easement, the grantee of the quasi-dominant tenement can claim an easement by implied grant or the grantor, if he retains the quasi-dominant tenement, can claim an easement by implied reservation against the grantee of the quasi-servient tenement. However, to support the claim of implied grant, the language most frequently used is that the quasi-easement must have been "apparent,"[10] "permanent"[11] and "reasonably necessary to the enjoyment of the conveyed land."[12] Where the implied easement is claimed by the grantor who retained the quasi-dominant tenement a more difficult problem is raised and courts are much more reluctant to find an easement by implied reservation.[13]

In short, the criticism of the principal case is its use of language from the *LaRue v. Greene County Bank*[14] and *Johnson v. Headrick*[15] opinions to create an impression that there is some sort of policy against the raising of easements by implication in this jurisdiction.

---

traditionally recognized and have been explained as founded on the principle that he who grants a thing to another is understood to grant that without which the thing cannot exist. Simonton, *Ways By Necessity*, 25 COLUM. L. REV. 571 (1925). A similar easement by strict necessity is also implied when the grantor retains a parcel that is land-locked. Brown v. Berry, 46 Tenn. 98 (1868); Harris v. Gray, 188 S.W.2d 933 (Tenn. App. M.S. 1945). The implication in such cases is often justified as essential to the policy of furthering the usability of land.

9. It is, of course, not possible for an owner to have a true easement in his own land because of the merger principle which accounts for the use of the qualifying term "quasi" where during unity of ownership one parcel of land is used to benefit another.

10. This requirement no longer means "readily visible" or "obvious" but includes all uses that would be discovered by a reasonable inspection of the premises. This requirement has posed considerable difficulty for one alleging an implied easement of a sewer line as was involved in the Line v. Miller case. For a good discussion indicating the modern trend see Van Sandt v. Royster, 148 Kan. 495, 83 P.2d 698 (1938).

11. The permanent or continuous requirement means such use as indicates an intent that it be permanent. It is enough to show that use was not occasional or temporary and although sewers and roadways are not continuously used in one sense they are quite generally held to satisfy the permanent or continuous requirement for an implied easement.

12. The requirement of reasonable necessity has given more trouble than either of the other two. Here, however, the decided trend of American authority is away from the necessity aspect and in support of implying easements that benefit or increase the value of the conveyed land. For good discussions of this point see Harris v. Gray, 188 S.W.2d 933 (Tenn. App. M.S. 1945); Jones v. Whitaker, 12 Tenn. App. 551 (1930).

13. The English courts have flatly refused to do so. See cases collected in 3 POWELL, REAL PROPERTY 433 (1952). A great many American courts have refused to do so and extreme reluctance is indicated in the Tennessee opinions. La Rue v. Greene County Bank, 179 Tenn. 394, 166 S.W.2d 1044 (1942); Johnson v. Headrick, 237 S.W.2d 567 (Tenn. App. E.S. 1948).

14. 179 Tenn. 394, 166 S.W.2d 1044 (1942).

15. 237 S.W.2d 567 (Tenn. App. E.S. 1948).

This is an erroneous impression. In the first place, the two cited cases involved claims of easements by implied reservation and, in the second place, other Tennessee decisions have been quite willing to recognize the validity of creating easements by implication. It is most unfortunate that the court used language indicating an easement cannot be created by implied grant or reservation "notwithstanding a drain existed at the time of the severence by conveyance, *if a substitute drain can be provided at reasonable expense.*"[16] This statement is not supported by any of the precedents in this jurisdiction and it should not be referred to as being the majority rule.

Covenants: Two cases decided during the survey period involved covenants running with the land. In both of these cases the covenants were contained in leases so that there was no question of "privity of estate"[17] to cloud the issue.

The covenant with which the court was concerned in *American Oil Co. v. Rasar*[18] was one which gave the lessee an option to renew. The option clause contained a provision requiring lessee to give a 30-day notice, prior to expiration of the lease if he intended to exercise the option. The original lessor sold his reversionary interest to defendants. The original lessee assigned its leasehold to the complainants. More than 30 days prior to the expiration of the lease, the complainants notified the original lessors of their intent to exercise the option, no such notice being given to defendant assignees of the original lessor. Near the time the lease was to expire and after the time for any notice to extend it, the defendant owners notified complainant that lease would expire on a specified date and, when it did expire, took possession. Complainant then filed this action to enjoin defendants from interfering with the property of the oil company on the premises. After hearing on the answers filed by defendant the chancellor dismissed the bill and the supreme court affirmed.

The great weight of authority in this country is to the effect that the burden of a covenant giving a lessee an option to renew runs with the reversionary interest and the benefit of such a covenant runs with the leasehold interest. It follows that in the instant case the defendants took the reversionary interest subject to the option to renew and that the complainants acquired as assignee of the leasehold interest the benefit of the option clause. But the notice requirement con-

16. Line v. Miller, 309 S.W.2d 376, 377 (Tenn. App. E.S. 1957).
17. Notes to Spencer's case indicate that as early as 1583 the English courts allowed burdens and benefits of lease covenants to run with the land. It is pointed out in American Oil Co. v. Rasar, 308 S.W.2d 486 (Tenn. 1957), that the statute of 32 Henry VIII, c. 34 (1541), recognized in Tennessee and most American states, provided that the benefits and burdens of such covenants should also run with the reversionary interest.
18. 308 S.W.2d 486 (Tenn. 1957).

tained in the option clause was for the benefit of the lessor and his successors in interest and was a burden to lessee and its successors in interest. Therefore, before the complainants could exercise the option to renew it was necessary for it to give such notice unless the giving of notice had been waived.[19] On the facts, defendants had not waived their right to notice.

The crucial question in the case was whether or not the giving of notice by complainant of intent to renew the lease to the original lessor satisfied the notice requirement and the court answered the question in the negative. The result is reasonable and logical. It is particularly valid in this case since complainants knew of defendant's interest in the premises and had in fact formally recognized defendants as owner of the reversion in prior dealing.

In *Southern Advertising Co. v. Sherman*[20] the advertising company sought to enjoin defendant from obstructing the view of one of its signs. Defendant was the grantee of the reversionary interest of plaintiff's lessor. A provision in the lease imposed on lessor an obligation not to permit any obstruction of complainant's sign erected on the leased premises. Defendant had erected a motel sign on premises subsequently acquired from another source which obstructed the view of complainant's sign.

As pointed out by the court, the lease provision on which complainant relies was either a personal covenant or a covenant running with the land. If personal to the lessor, the defendant, lessor's assignee, not having assumed the burden of it, would not be bound by it. This, of course, may mean that lessor is now liable for its breach. If, on the other hand, it was a covenant running with the land, the burden of such covenant would ordinarily be limited to land owned by the lessor at the time the covenant was entered into.

The court apparently realized that servitudes can be created which would bind after acquired land of a covenantor but the intent to do so would have to be clearly found before given effect. Assuming that this is so, there is no basis on which to hold that a covenant, running or otherwise, between complainant and defendant's lessor could be held to burden land acquired by defendant from another source.

Adverse Possession: The case of *Cobb v. Brown*[21] was decided in part by applying section 28-205 of the Code.[22] A decedent had gone into possession and held a tract of land under a chancery court decree in a divorce proceeding purporting to convey to her an estate in fee

19. Such a notice provision is everywhere construed as being a condition precedent to the exercise of the option to renew.
20. 308 S.W.2d 491 (Tenn. App. E.S. 1957).
21. 305 S.W.2d 241 (Tenn. App. W.S. 1956).
22. TENN. CODE ANN. § 28-205 (1956).

simple in said tract. The court held that she died seized and possessed of the premises by operation of the statute.

In *Moore v. Brannan*[23] Judge Hickerson of the middle section court of appeals did an excellent job of analyzing and explaining four Tennessee statutes[24] and the one common law rule pertaining to limitations of actions relating to realty. This decision merits the attention of all attorneys interested in Tennessee land law.

Prescription: In *Eckhardt v. Eckhardt*,[25] the middle section of the court of appeals sustained the chancellor of Davidson County in holding that defendant, a tenant in common with complainants, had acquired a title to the common property superior to that of her co-tenants. The exclusive, uninterrupted possession of defendant and her husband for over twenty years operated to extinguish the interest of the compainant co-tenants by virtue of the doctrine of prescription.[26]

There is little to be added to the analysis of this case contained in the comment appearing in 11 *Vanderbilt Law Review* at 645. It is there pointed out that Tennessee stands alone in applying the fiction of lost grant to corporeal interests in land and is one of the few states that still gives effect to the doctrine with respect to incorporeal interests. It is difficult to see how the court could have reached any other result in light of the Tennessee precedents but it is hoped that the legislature will correct the apparent necessity for a continued use of the fiction.

The anomaly produced by the instant case is clearly spelled out in the opinion. The court points out that there is a relation of trust between tenants in common and that the possession of one cannot be adverse to others until there is a disseizure by him of the others by actual ouster. This principle has stood the test of time and is reinforced by rules and presumptions which require acts on the part of a co-tenant of obvious and unmistakable character before the intent

23. 304 S.W.2d 660 (Tenn. App. M.S. 1957).

24. TENN. CODE ANN. § 28-201 (1956) is characterized as an affirmative weapon which bars the right of others. This statute takes the place of a formal conveyance of the land but no legal title can be acquired under it unless claimant holds adversely for seven years under a recorded assurance of title purporting to convey an estate in fee. Recording must have been in county where the land lay. TENN. CODE ANN. § 28-202 (1956) is a defensive statute requiring the holder of the legal title out of possession to bring suit against an adverse claimant in possession under registered assurance of title within seven years. TENN. CODE ANN. § 28-203 (1956) is also a defensive statute which protects the adverse holder only to the extent of his actual possession. TENN. CODE ANN. § 28-205 (1956) is an affirmative weapon vesting title in the one who has held adversely for seven years under color of title provided the color has been recorded for a thirty year period in the county in which the land lies or has been entered on minutes of a court for a thirty year period. The common law rule applied in Tennessee permits acquisition of title by prescription or a twenty year adverse possession with or without color of title. For a good division see, Note, *Title By Adverse Possession in Tennessee*, 5 VAND. L. REV. 621 (1952) and Comment, 23 TENN. L. REV. 295 (1954).

25. 305 S.W.2d 346 (Tenn. App. M.S. 1957); 11 VAND. L. REV. 645 (1958).

26. 5 VAND. L. REV. 621, 622 (1952).

to disseize will be given effect. Yet, while recognizing these rules and though finding that there was in the instant case no sufficient proof of an ouster or any act giving complainants notice that defendant was holding the lot adversely, the court concludes that the doctrine of prescription based on the fiction of lost grant dictates the same result as would be reached under a 20-year statute of limitations requiring that the holding be adverse. While such a result may tend to stabilize land titles it does considerable violence to the view that there is a relation of trust and confidence between tenants in common.

Dedication: Dedication is probably best described as one of many processes by which the owner of an interest in land can transfer that interest, in whole or in part, to the public for a public purpose.[27] The process may be a formal one provided for by statute or it may be informal under common law rules and principles. In the United States dedication of fees or lesser interests have been permitted with respect to highways, parks, schools, cemeteries and some charitable uses. In all cases where the question of a dedication is raised the search is for facts that will establish: (1) the intent or desire of a landowner to devote his land to a public use and (2) an acceptance by the public of such offer.

Since by dedicating land to public use an owner is giving up or transferring a substantial interest, sometimes in quite informal ways, his interest or desire to do so is not lightly inferred. Decisions uniformly say that such intent must be unequivocally manifested by evidence that is clear and convincing. Where statutory methods prescribe the procedure to be followed substantial compliance with the statutory requirements is the least that will satisfy.

It is the nonstatutory dedication process that has resulted in the bulk of dedication litigation. In these cases the question of whether there has or has not been a dedication is treated as one of fact, the burden of proof resting on the party who asserts a dedication. Evidence of the intent or desire of the landowner to give his land for a public purpose is usually in the form of a plat showing public areas followed by the selling of lots with reference thereto; petitions to authorities for help in preparing land for a public use; or, acquiescence over a long period of time to use by the public. Evidence of an acceptance by the public of the offer to dedicate is usually a public act such as the resolution of a city council or a court order; conduct such as the laying of a sewer line or actual use for a public purpose; or, the spending of public funds on said land.

In a concise and well-reasoned opinion[28] by Chief Justice Neil during

27. 11 McQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS § 33.02 (1950); 6 POWELL, REAL PROPERTY 934 (1958); Note, 29 YALE L.J. 461 (1920).
28. McCord v. Hays, 302 S.W.2d 331 (Tenn. 1957).

the survey period the above general principles, supported by many Tennessee cases, are recognized. The supreme court affirms the court of appeals decision reversing the chancellor of Gibson County who had dismissed comlainant's action to enjoin erection by defendant of a barrier across an alley separating complainants lot from that of the defendant. The court held that the evidence established defendant's intent to dedicate and that the public had accepted use of the alley as a public way.

The case of *Rutherford County v. City of Murfreesboro*[29] is novel and unusual to say the least. In this action the City of Murfreesboro asserted title to land surrounding the county courthouse. There appears to be no question but that the premises in question orignally was set aside for use by the county. The theory on which the city based its action was that by permitting the public to use the land for a long period of time the county had dedicated it for parking purposes and that in some way title was thereby vested in the city. If such disputes arising out of parking meter installations were rare and isolated things the action by the city in this instance would have been absurd. But cities all over the country have been extending parking meter installations and in county seats there have been running battles between the county and city "fathers."

Judge Shriver resolved the case on well-established principles of common law dedication. Even assuming that the county governing body could impliedly dedicate land to a particular use and in this way turn it over to a city, there was not a sufficient intent to do so indicated by the facts in this case. Actually, it appears that the county officials were careful throughout to maintain the permissive character of the use thereby negating the intent that is necessary for a common law dedication.[30] But the premises in dispute in this action was public property from the beginning. Some public use of necessity was to be made of it and that use under the aegis of the county governing body. It makes sense to say that private individuals can dedicate land to public use. It is somewhat questionable that land belonging to the public can be dedicated to a public use and it would certainly be a strained construction which would find that one governmental body had lost title to public land to another governmental body by the process of common law dedication.

Description: It has long been established that one of the essential elements of a valid deed is a sufficient description of the land granted. Indefiniteness of description constitutes one of the major causes for

29. 309 S.W.2d 778 (Tenn. App. M.S. 1957).

30. See Thurman, *Local Government Law—1958 Tennessee Survey*, 11 VAND. L. REV. 1303 (1958) and Note, 24 TENN. L. REV. 1052 (1957).

finding a deed a nullity.[31] The criterion to be used in testing the adequacy of the legal description varies somewhat from jurisdiction to jurisdiction[32] and within any given jurisdiction it is often next to impossible to reconcile all of the cases.[33]

The purpose of a legal description in a deed or other instrument is to supply the means for identifying and locating the property in question. The actual identification and location of the boundaries of the land are a matter of survey. Most courts have concluded that any description, therefore, which can be identified by a competent surveyor with reasonable certainty is sufficient. Courts, however, are in some disagreement as to the extent to which extrinsic evidence may be used in making this identification. The Tennessee cases cited above indicate that there is not complete uniformity in the approach to questions of the adequacy of description, the *Parsons* case taking a restrictive approach and the *Jones* case a liberal approach in finding the description adequate.[34]

During the present survey period two cases were decided by Tennessee courts wherein questions of the sufficiency of legal descriptions were raised. In *Moore v. Brannan*[35] the middle section of the court of appeals in an ejectment action cited the opinion of the supreme court in *Southern Coal & Iron Co. v. Schwoon*[36] to the effect that a grant cannot be lost for uncertainty in its boundary "'. . . if by any reasonable means the intention of the contracting parties can be ascertained!'"[37] The court then went on at length to consider extrinsic evidence in sustaining the sufficiency of the description. This opinion illustrates a court giving a party every opportunity to support the sufficiency of the description on which he relies and is commendable in giving effect to the intent of a grantor in the face of considerable difficulty.[38]

31. 6 POWELL, REAL PROPERTY 194 (1958).

32. *Compare* Rogers v. Manning, 203 Ga. 771, 48 S.E.2d 527 (1948), *with* Broadway Hosp. & Sanitarium v. Decker, 47 Wash. 586, 92 P. 445 (1907).

33. *Compare* Parsons v. Hall, 184 Tenn. 363, 199 S.W.2d 99 (1946), Denison-Gholson Dry Goods Co. v. Hill, 135 Tenn. 60, 185 S.W. 723 (1916) *and* Louisville & N. R.R. v. Webster, 106 Tenn. 586, 61 S.W. 1018 (1901), *with* Jones v. Mabry, 225 S.W.2d 561 (Tenn. App. E.S. 1949) *and* Sheffield v. Franklin, 222 S.W.2d 974 (Tenn. App. W.S. 1947).

34. See Wallace v. McPherson, 187 Tenn. 333, 340, 214 S.W.2d 50 (1947) where the court cites with approval from 16 AM. JUR., *Deeds*, § 263, p. 586 as follows:

> "The test is said to be whether a surveyor with the deed before him and *with or without* the aid of extrinsic evidence can locate the land and establish the boundaries." (Emphasis added.)

This is a broad rule and to the extent that it permits the identification of land with the aid of extrinsic evidence it is difficult for title examiners to apply. In view of *Parsons v. Hall, supra* note 33, and the *Campbell Farmers Co-op* case discussed herein title examiners must proceed with caution.

35. 304 S.W.2d 660 (Tenn. App. M.S. 1957).

36. 145 Tenn. 191, 239 S.W. 398 (1921).

37. 304 S.W.2d 660, 664 (Tenn. App. M.S. 1957).

38. *Accord,* Hoban v. Cable, 102 Mich. 206, 60 N.W. 466 (1894); Brookman

The supreme court, however, in the case of *Campbell Farmers Co-op v. Moore*[39] took a much more restricted view of the adequacy of a legal description holding a description contained in a contract for the sale of real estate insufficient as a matter of law. The court affirmed the sustaining of vendor's demurrer to vendee's action for specific performance stating that the description was insufficient to satisfy the statute of frauds.[40]

While appreciating the fact that the authority cited by the court in the *Campbell Farmers Co-op* opinion supports the result reached by the court, other cases cited herein could have been used as a basis for overruling the demurrer. It appears that this decision is out of tune with the more recent Tennessee decisions and that sustaining the demurrer was somewhat premature.[41] Vendee should have been given the opportunity to identify the land. It is not inconceivable that he could have done so.

Delivery: It is elementary law that the transfer of ownership of land by deed requires a delivery of the deed. There has been a multitude of litigation wherein the effectiveness of a deed has turned on the question of delivery. The finding by a court that there has been delivery of the instrument is a judicial conclusion that the conduct of the grantor, which may consist of acts or statements or both, indicates his intent to treat the deed as an unrecallable instrument giving the grantee what it purports to convey to him.[42]

The date of a deed's effectiveness is the date of its delivery. It is generally regarded as being no barrier to such effectiveness for the grantor to have reserved to himself an estate for life or such an estate plus the power to revoke.[43] After a deed is effective it is of no consequence that the grantor changes his mind, or destroys the deed, or attempts to convey the same land to another, and loss of the deed, alteration of the text or redelivery by the grantee to the grantor is without effect.

In the cases of *Ottinger v. Brown* and *Brown v. Ottinger*[44] title to

v. Kurzman, 94 N.Y. 272 (1883); Fortenberry v. Cruse, 199 S.W. 523 (Tex. Civ. App. 1917).

39. 303 S.W.2d 735 (Tenn. 1957).

40. An attempt to reconcile the cases on the basis of the nature of the action in which a question as to the sufficiency of description is raised is not justified. The basic issue is the same whether a deed, will or contract for sale is involved and whether the action is specific performance, ejectment, injunction, reformation, etc.

41. For an additional discussion of the case see, Smedley, *Equity—1958 Tennessee Survey*, 11 VAND. L. REV. 1267 (1958).

42. Early v. Street, 192 Tenn. 463, 241 S.W.2d 531 (1951); Miller v. Morelock, 185 Tenn. 466, 206 S.W.2d 427 (1947); Kirkman & Luke v. Bank of America, 42 Tenn. 397 (1865); Brevard v. Neely, 34 Tenn. 164 (1854); Cox v. McCartney, 236 S.W.2d 736 (Tenn. App. M.S. 1950).

43. See 6 POWELL, REAL PROPERTY 232 (1958).

44. 306 S.W.2d 5 (Tenn. App. E.S. 1957).

a farm in Greene County was in question. The cases were consolidated since the question involved in both suits was the delivery of a deed executed and acknowledged by grantor on October 21, 1942 and recorded in the office of the Register of Deeds on the same day. As is so often true in cases where delivery is in question, this decision turned upon one of the many presumptions operating in the area. When certain evidential facts are proved the party challenging delivery then has the burden of producing evidence sufficient to rebut a presumption of delivery based on the proved fact. Among such presumptions is one that arises from proof of the recording of the deed by the grantor. In the *Ottinger* case the court of appeals affirms the chancellor's finding that registration of the deed had not been satisfactorily explained. In short, the party challenging delivery did not rebut the presumption arising from the fact that the deed had been placed on record.

In the instant cases the grantor had regained possession of the deed and had, subsequent to its execution and recording, executed a will in which she denied that the deed had ever been validly delivered. The position of the court is summarized in the following statement from the opinion:

> The fact that the grantor regained possession of the deed is a circumstance to be considered as reflecting upon her original intention in executing and parting with possession of the deed but this circumstance is not conclusive against delivery. 26 C.J.S. *Deeds* § 43, p. 694. And it is not sufficient as a matter of law to rebut the presumption of delivery arising from the fact of registration, especially where the grantees are minors and members of the grantor's family . . .[45]

Construction: In construing a deed, as in the construing of most legal instruments, a court is searching for the intent of the grantor or maker. As a matter of fact, the court is concerned alone with the grantor's intention.[46] The problems arise with respect to the rules of construction to be used in determining such intent.

The general principle of construction would derive the grantor's intent from the language of the entire instrument. In the past this general approach has been impinged upon by excessive resort to the doctrine of repugnancy and by undue emphasis on a hierarchy of parts which gives special importance to the granting clause of a deed.[47] The strong and desirable trend of modern authority is to avoid the older approach and to determine the intent of the grantor by all that he has written irrespective of the sequence or placement of the

45. *Id.* at 8.
46. Hutchison v. Board, 194 Tenn. 223, 250, 250 S.W.2d 82 (1952).
47. See 6 POWELL, REAL PROPERTY 244 (1958).

clauses. The Tennessee Supreme Court is firmly committed to this view.[48]

In *Southern Railway Co. v. Griffitts*[49] the eastern section of the court of appeals sustained the construction placed on a deed by the trial judge stating the rule of construction as being the determination of the grantor's intention "as gathered from the language of the entire instrument and surrounding circumstances and in arriving at such intention from conflicting or repuguant clauses technical rules as to division of deeds into formal parts will not prevail against the manifest intent of the parties."[50] In looking at the deed involved the court found the grantor's intent was to convey an easement for railroad purposes and not a fee simple title.

EMINENT DOMAIN

With the 50 billion dollar super highway project just getting into full swing we can expect eminent domain cases to become more numerous and to involve and test points of law heretofore thought settled. The issue of most concern to landowners and to the public in condemnation proceedings is how do we go about arriving at a fair and just amount in compensating an owner for his land. That this is indeed a difficult problem is indicated in the case of *Davidson County Board of Education v. First American Nat'l Bank.*[51]

On the trial of this case, the circuit judge of Davidson County had excluded from the evidence submitted to the jury a plat which had been prepared and offered by the property owner. The purpose in offering such a plat was to establish in the eyes of the jury the value of the property if devoted to a particular use, a residential subdivision. The court of appeals held that it was error to exclude the plat. The supreme court reverses the court of appeals and affirms the award by the trial court.

In a rather lengthy opinion the supreme court attempts to spell out the evaluation rule as it had previously been stated in *Alloway v. City of Nashville.*[52] Starting with the proposition that it is the fair market value[53] that the owner is entitled to receive the court then attempts to show how you arrive at that value. The undertaking was a difficult one and Justice Burnett is to be commended for a splendid effort in seeking to clarify the problem. To hold some doubt as to how the rule

48. See Hutchison v. Board, 194 Tenn. 223, 250 S.W.2d 82 (1952).
49. 304 S.W.2d 508 (Tenn. App. E.S. 1957).
50. *Id.* at 510.
51. 301 S.W.2d 905 (Tenn. 1957).
52. 88 Tenn. 510 (1890).
53. ". . . that value which might be derived if a party is willing to sell but does not have to sell, a piece of property, and a party who is willing to buy, but he does not have to . . ." Davidson Co. Board of Educ. v. First American Nat'l. Bank, 301 S.W.2d 905, 907 (Tenn. 1957).

will apply in a given case is not to reflect adversely on this decision. There will be other decisions and eventually we will understand the workings of the rule.

But how do you arrive at fair market value? It is the "value in view of all available uses," not "value for the best use."[54] ". . . [T]he test is not the value for a special purpose, but the fair market value of the land in view of all the purposes to which it is naturally adapted."[55]

In *Hassler v. Overton County*[56] the supreme court in an opinion by Justice Prewitt reversed the circuit court of Overton County which had sustained a demurrer to plaintiff landowners' suit against the county for damages to their land arising out of construction of a highway. In remanding for a new trial the court reaffirms the rule enumerated in *Morgan County v. Neff*[57] and *Carter County v. Street*.[58] The rule is really an exception to the general rule that a landowner's execution of a right of way deed or the condemnation of a right of way precludes a subsequent recovery for damages to the remaining land[59] and permits recovery where the subsequent loss or damage was not contemplated by the parties at the time they entered into an agreement, or, if advanced, would have been rejected as speculative and conjectural. In the *Hassler* case the plaintiffs had executed a contract agreeing to furnish to the county, without charge, a right of way over their land. They then sought damages alleging the threatened destruction of land and buildings that had not been anticipated. The supreme court said they were entitled to be heard distinguishing *Denny v. Wilson County*[60] on the ground that the complainant in that case had executed a warranty deed covering any and all damages that he might suffer.

In *Knoxville Housing Authority v. Bower*[61] the supreme court reversed the court of appeals and ordered judgment on the verdict of the circuit court of Knox County in a condemnation proceeding. The court of appeals had reversed the judgment on the ground that incompetent evidence (the amount of taxes on the property involved) had been admitted in the trial court and that petitioners had been prejudiced thereby. The court admitted that evidence of the assessed valuation of the property involved is not competent evidence of market value but pointed out that it was the rate which was testified

54. *Ibid.*
55. *Id.* at 908.
56. 311 S.W.2d 206 (Tenn. 1958).
57. 36 Tenn. App. 407, 256 S.W.2d 61 (1952).
58. 36 Tenn. App. 166, 252 S.W.2d 803 (1952).
59. See Trautman, *Real Property—1953 Survey of Tennessee Law*, 6 VAND. L. REV. 1080, 1091 (1953) for a discussion of these cases.
60. 198 Tenn. 677, 281 S.W.2d 671 (1954).
61. 308 S.W.2d 398 (Tenn. 1957).

to in this case, that testimony of petitioner had made the rate relevant, and that though heresay, it was not on these facts prejudicial.

MISCELLANEOUS

Partition: In *Summers v. Conger*[62] the middle section of the court of appeals sustained a trial court which in a partition action had ordered the land involved sold for partition. The question raised was whether or not there was substantial evidence in the record to support the decree for sale and the court felt that there was. A number of witnesses had testified that the value of the land would be reduced if partitioned in kind. Citing *Wilson v. Bogle*[63] the court construed the statute[64] as making sale a matter of right where either one of the two conditions stated in the statute is found to exist.

LANDLORD AND TENANT

Fraudulent Alteration of Lease: In *Christian v. Pan Am Southern Corp.*[65] a plaintiff, lessor, sought rescission of a lease alleging that after it had been executed by him the defendant, lessee, had inserted a new clause materially altering the duties of lessor under the lease. A trial by jury on the question of the alleged alteration resulted in a verdict that the contract was altered after plaintiff executed it. The chancellor of Hamilton County then entered a decree invalidating the lease. There can be no question but that the facts justified rescission.

The troublesome question, however, was whether or not the decree cancelling the altered lease should provide for the restoration of a prior lease between the parties, the release of which had been part of the consideration for the new lease. The chancellor decreed the reinstatement of the prior lease and decreed the recorded release of it a nullity. On this point the court of appeals reversed the chancellor holding that on the facts of this case the lessee was not entitled to have the prior lease reinstated.

It is elementary law that a condition to rescission of a contract is a restoration of defendant to the status quo on the very sound principle that a plaintiff is not entitled to be relieved of his obligations and at the same time retain the consideration for their performance. While it is customary to make an offer of restoration in the bill and while there is some authority for the proposition that the offer is necessary in order to maintain the bill[66] it is generally held that if the decree in the suit can provide for restoration of consideration by plaintiff then

62. 307 S.W.2d 936 (Tenn. App. M.S. 1957).
63. 95 Tenn. 290, 32 S.W. 386 (1895).
64. TENN. CODE ANN. § 23-2128 (1956).
65. 309 S.W.2d 378 (Tenn. App. E.S. 1958).
66. *Id.* at 380.

an offer or tender is not necessary.[67] The chancellor in the instant case had so provided.

But the court was of the opinion that while restoration to the status quo as a condition to a decree of rescission is a sound principle of general application that it should not be applied to a case where rescission is based on fraudulent material alteration. Citing *Columbia Grocery Co. v. Marshall*,[68] the court held that alteration with fraudulent intent obviates the necessity for a complainant to make restitution and that the facts in this case established the alteration by defendants as being fraud in fact.[69] The case states a rule followed in a number of jurisdictions but a rule extremely difficult to apply.[70]

67. Hawkins v. Byrn, 150 Tenn. 1, 261 S.W. 980 (1924); 5 WILLISTON, CONTRACTS 4288 (2d ed. 1937).

68. 131 Tenn. 270, 277 (1914).

69. As with many of the restitution problems we have here a clash between conflicting policy objectives. The requirement of restoration as a condition of rescission is founded on the principle that to allow one to avoid his obligations without restoring the consideration is itself permitting a fraud. On the other hand, as pointed out in the principal case, to allow a party to fraudulently alter a contract and then, when caught, fall back on the original consideration would be to encourage this undesirable conduct. If permitted, a crook would have everything to gain and nothing to lose.

70. See Note, *Necessity of Restitution in Suits for Rescission Based on Fraud*, 29 COLUM. L. REV. 791 (1929).