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REAL PROPERTY—1957 TENNESSEE SURVEY

THOMAS G. ROADY, JR.*

The Rule in Shelley's Case Revisited: During the period covered by this survey the Supreme Court of Tennessee handed down an opinion¹ involving one of those problems periodically recurring in the real property field. In this decision the court revisited the Rule in *Shelley's Case*, pointing out the classic situation to which it applies and calling attention to the statute in Tennessee which abolished the Rule.²

The question before the court was in terms of what estate the grantee, Ralph Parker, acquired where the conveyance was to "Ralph Parker and at his death to his bodily heirs."³ The court concluded that this terminology would have called for an application of the Rule in *Shelley's Case* at the common law and that, therefore, the Tennessee statute⁴ abolishing the Rule was determinative of the question. Under this statute Ralph Parker's interest is a life estate with a contingent remainder in fee to those who at his death will answer the description of the heirs of his body.⁵

Assuming, as the court did and with apparent justification, that there is no distinction or legal difference between a conveyance "to Ralph Parker for life and at his death to his bodily heirs" and a conveyance "to Ralph Parker and at his death to his bodily heirs" as in the deed under construction, then the court is fully supported by Tennessee cases and by the authorities in concluding that the Rule in *Shelley's Case* would have controlled prior to the statute abolishing the rule in this jurisdiction.⁶

The court had a little difficulty rationalizing the case of *Brown v. Brown*,⁷ decided in 1897. In that case the court had held that the grant-

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1. *Butler v. Parker*, 293 S.W.2d 174 (Tenn. 1956).

2. *Id.* at 177.

3. *Id.* at 176.

4. TENN. CODE ANN. § 64-103 (1956).

5. But the court states that "under the statute all Parker got in the instant case was a life estate and that his children have a contingent remainder." 293 S.W.2d at 178. This result certainly does not follow from an application of the statute. As a matter of fact, if the court is construing the words "his bodily heirs," as used in the conveyance, to mean "his children" then there is no need to discuss the Rule in *Shelley's Case* or the entail statute since neither would have any application. 1 AMERICAN LAW OF PROPERTY § 4.43 (Casner ed. 1952); TIFFANY, REAL PROPERTY 233, 235 (abr. ed. 1940); 3 VAND. L. REV. 814, 816 (1950).

6. *Guy v. Culberson*, 164 Tenn. 509, 51 S.W.2d 500 (1932); *Polk v. Faris*, 17 Tenn. 209 (1836); 1 AMERICAN LAW OF PROPERTY § 4.41 (Casner ed. 1952); 1 WALSH, REAL PROPERTY 178 (1947); 3 POWELL, REAL PROPERTY 239-55 (1952); 10 TENN. L. REV. 238 (1932).

7. 43 S.W. 126 (Tenn. Ch. App. 1897).

ing language in a deed "unto Sallie Brown, and to her bodily heirs after her decease" created a fee simple estate in Sallie Brown by virtue of the statute abolishing estates tail in this jurisdiction. The court recognized the striking similarity between this terminology and that involved in the case under discussion but concluded that the holding in the *Brown* case was based on a "misconception of the rules of construction with reference to the creation of estates in real property."⁸

The *Butler* case indicates that the Tennessee court is committed to avoiding a construction calling for an application of the statute abolishing estates tail if this is possible. This is undoubtedly due to the fact that an application of this statute reduces the hope of issue of the first taker to the bare expectancy of an heir and results in a situation not unlike that which existed at the common law with respect to the Rule in *Shelley's Case*. Apparently the court feels that an arbitrary application of the statute which turns an estate tail into a fee simple more often than not frustrates the actual intent of a grantor; and even though strained constructions may result, we can expect the decisions to follow the tenor of this one, for in this way the limitation gives an estate for life to the first taker with remainder interests in others as purchasers.⁹ One hopes, however, that Parker does not eventually die survived by grandchildren of a deceased child, for in that event the words of the court to the effect that Parker's children have a contingent remainder could cause it some embarrassment.

Boundary Lines: In *Montgomery v. Nicely*¹⁰ the Eastern Section of the Court of Appeals found that there was sufficient evidence to support a decree below locating, according to a surveyor's report, a disputed boundary line. The suit was originally filed in the circuit court for damages for timber which plaintiff alleged was wrongfully cut from his land; but after plaintiff had presented his evidence before a jury, the circuit judge, on his own motion, decided that matters of an equitable nature were involved and transferred the case to the chancery court. The chancellor, on finding that proof was needed concerning the location of a boundary line between land owned by the respective parties, appointed a surveyor to determine the true location of the line; the decree affirmed by the court of appeals was based on the surveyor's report.

There was some dispute and some uncertainty about the direction and length of defendant's northern boundary line, but the court felt that the evidence tended to support, and certainly did not preponderate against, the decree. In reaching this conclusion it was pointed out that

8. 293 S.W.2d at 176.

9. See 2 POWELL, REAL PROPERTY 81-83 (1950); 1 WALSH, REAL PROPERTY 543-48 (1947); 3 VAND. L. REV. 814, 814-17 (1950).

10. 301 S.W.2d 379 (Tenn. App. E.S. 1956).

"the rule is well settled that a call for a natural or fixed object prevails over calls for courses and distances unless to do so results in an absurd conclusion and one manifestly not intended."¹¹ This rule appears to be amply supported by the authorities cited in the opinion.

Adverse Possession: An extremely interesting opinion, delivered by the Middle Section of the Court of Appeals and affirmed by the Supreme Court, involved the nature of a title acquired by a husband and wife whose only claim to the property was through adverse possession of some forty years.¹² The case is noteworthy for at least three reasons: (1) the fact that the common law estate known as "tenancy by the entirety" is involved; (2) the fact that the holding that the estate acquired by the adverse possession of a husband and wife is a tenancy in common appears to run counter to the spirit of a number of cases in this jurisdiction which favor the tenancy by entirety; and (3) the fact that the court and counsel could find no authority to the effect that a joint estate could arise out of adverse possession when in fact such authority appears to exist.

The case originated as an ejectment action brought by the collateral heirs of the deceased husband against the collateral heirs of the deceased wife. The wife had survived the husband some four years after the two had lived on the 60-acre farm from 1910 until 1950. In such a situation one can well appreciate the apparent injustice of a holding which would favor the collateral heirs of either party. Neither group has any particular "equities" to be evoked in its behalf and the question seems to be who is to receive the windfall. In such a situation a tenancy in common reaches a beautifully just result—the collateral heirs of both parties share equally in the property and a partition is decreed.

For one or more of the above reasons this case has received rather wide comment.¹³ Other remarks concerning it are contained elsewhere in this survey issue.¹⁴ While it appears that there is authority which would have supported a finding of a tenancy by the entirety on the facts,¹⁵ it is unlikely that many such fact situations will arise. It is certain that this jurisdiction is now rather firmly committed to the proposition that a husband and wife acquiring title to realty by adverse

11. *Id.* at 384.

12. *Preston v. Smith*, 293 S.W.2d 51 (Tenn. App. M.S. 1955).

13. See 10 VAND. L. REV. 460 (1957); 16 MD. L. REV. 352 (1956); 55 MICH. L. REV. 1192 (1957); 22 MO. L. REV. 91 (1957); 24 TENN. L. REV. 892 (1957).

14. Harbison, *Domestic Relations—1957 Tennessee Survey*, 10 VAND. L. REV. 1082, 1093 (1957).

15. 2 AMERICAN LAW OF PROPERTY § 6.6(a) (Casner ed. 1952); 2 COKE, LITTLETON § 180b (1853); 2 TIFFANY, REAL PROPERTY 204 (3d ed. 1939); 48 C.J.S., *Joint Tenancy* § 3(a) (1947). The court might also have been persuaded to accept the presumption of grant had there been any compelling equities in favor of a tenancy by the entirety. See Note, *Title by Adverse Possession in Tennessee*, 5 VAND. L. REV. 621 (1952).

possession without color of title hold as tenants in common and not as tenants by the entirety.

A second case involving a claim of title by adverse possession was decided by the Middle Section of the Court of Appeals during the survey period.¹⁶ In this case the court found that the evidence in the hearing below was sufficient to support the injunctive relief granted plaintiff. Plaintiffs were found to have been in actual possession of the property, and it was found that defendant had actual knowledge of this possession. Therefore, defendant was enjoined from committing trespass and from cutting and removing timber on the land.

The significance of the case is enhanced by the court's discussion of the four ways in which a party can become the owner of the legal title to land in Tennessee, *viz*: "(1) By a connected chain of title deraigned from either the State of Tennessee or of North Carolina. (2) Deraignment of title to a common source. (3) By seven years adverse possession under a registered assurance of title where the land has been granted by the State. (4) By twenty years actual adverse possession . . ." ¹⁷ This discussion resolves the claim of defendant in its cross-bill that it had acquired title to the land by adverse possession. The evidence did not support defendant's contention.

Eminent Domain, Dedication and Easements: What is the nature of the interest acquired by a public service company which enters upon and uses land of another for public purposes for a period of one year, where the owner thereof fails to institute suit for damages within the one year period as provided for by statute?¹⁸ It has been more or less generally assumed that by virtue of this Tennessee statute an interest would arise of a nature equivalent to that resulting from an eminent domain proceeding under Tennessee Code sections 23-1401 to 23-1422 or from a voluntary conveyance of an interest from the owner to the public corporation. There was considerable dicta in the court opinions applying this section of the Code to support this assumption.¹⁹ But the question had never been directly ruled upon until it was presented to the Eastern Section of the Court of Appeals in a case during the survey period.²⁰ Treating the matter as one of first impression the court holds that the right acquired by the corporation under section 23-1423 of the Code is nothing more than the right to *occupy* the land

16. *Welch v. A. B. C. Coal Co.*, 293 S.W.2d 44 (Tenn. App. M.S. 1956).

17. *Id.* at 48.

18. TENN. CODE ANN. § 23-1423 (1956).

19. *Shinkle v. Nashville Improvement Co.*, 172 Tenn. 555, 113 S.W.2d 404 (1938); *Tennessee Coal, Iron, & Railroad Co. v. Paint Rock, Flume & Transp. Co.*, 128 Tenn. 277, 160 S.W. 522 (1913); *Smith v. Nashville & Ky. Ry.*, 88 Tenn. 611, 13 S.W. 128 (1890); *Tennessee Elec. Power Co. v. Holt*, 3 Tenn. App. 372 (E.S. 1926). See also Trautman, *Real Property—1956 Tennessee Survey*, 9 VAND. L. REV. 1089, 1105-06 (1956).

20. *Rogers v. Knoxville*, 289 S.W.2d 868 (Tenn. App. E.S. 1955).

for public use. This view is succinctly stated by the court in the following words:

. . . an illegal possession cannot ripen into a vested legal right to an easement short of 20 years adverse possession. The failure of the owner to exercise *his* right to sue for damages will not be held to confer vested rights upon the expropriator of his property without compensation.²¹

While this decision could not well have even been predicted from prior decisions, it appears to be a desirable one and one that the writer believes has caught the spirit of the statutes involved. The terminology, as the court pointed out, falls far short of indicating legislative intent that a greater interest be acquired under the statute. The result will certainly discourage any tendency that a public corporation might have had heretofore to take the property of another without a proceeding of some kind to compensate the owner. The construction here given Code section 23-1423 will accomplish the desirable objective of preventing an interruption or interference with land appropriated for public use but avoid the harsh and rigorous result which flows from a construction which bars an owner or his successor in interest forever after the lapse of one year. At the same time the court pointed out that if the legislature desires that an easement arise after one year they can say so.²²

Other methods of reaching this same result may exist. For example, the court could have described the interest as an easement in gross but because of the peculiar manner in which it was created not alienable or assignable. In any event, it is highly pleasing to observe the court striking this blow for the property owner who over the years has been the victim of encroaching demands being made in the name of the "public interest."

There is another facet to the case that is somewhat perplexing. Having decided that the interest of the Tennessee Valley Authority, or of its assignor, was not transferrable but depended on continued public use of the property, the court then hung the decision on another peg. It decided that even if an easement was acquired by T.V.A. under section 23-1423 it had been abandoned in view of the fact that use of the transmission line was discontinued in 1944 and no further public use was attempted until after the grant to the city in 1952. Without laboring this point, the court apparently was distinguishing between granted or prescriptive easements and easements acquired through eminent domain. As to the latter type of easement, the court said there is a presumption of abandonment when the property is not devoted to a public use for any considerable period of time.

21. *Id.* at 871.

22. *Ibid.*

There is, as the court pointed out in the opinion, authority recognizing that an easement may be extinguished by abandonment. In all such cases, the ultimate fact to be established is the intent to make no further use of the easement. Such intent might be evidenced by verbal expression, which alone is not sufficient, or by acts and conduct of the party claiming the easement. This evidence, in general, takes the form of cessation of use and conduct inconsistent with the intent to use the easement further. In this regard one writer stated:

It seems to be well settled that an easement created by a deed of grant, or otherwise by writing, cannot be proved to have been extinguished by proof only of nonuser, no matter how long such nonuser may have continued. Where, however, the easement originated in prescription, there are many dicta, and some decisions, that nonuser for the prescriptive period establishes a presumption of abandonment, which prevails unless it is rebutted by contrary evidence. This differentiation does not seem to be a wise one. An easement established by prescription is just as well established as one originating in the most formal deed. Their methods of extinguishment should be identical.²³

It is submitted that to distinguish an easement acquired by eminent domain from easements acquired in other ways is not realistic; while the court might well have proceeded on the theory of abandonment of the easement, it is somewhat confusing to make this distinction.²⁴

In *Maxwell v. Lax*²⁵ the Western Section of the Court of Appeals had occasion to consider the right of a dedicator of a public way thereafter to authorize a particular use of property included in the way. The case turns on the court's finding that the particular use involved (operation of a sign) constituted a nuisance. Injunctive relief was granted to an adjoining property owner adversely affected.²⁶ In this case the dedication was a formal one "for street purposes as under the common law." While the dedicator certainly retained many of the rights of ownership in this instance and might well have been in a position to authorize some special use of the way, he could not interfere with the easement of the public in any way nor could he maintain or authorize the existence of a nuisance. The law in this respect is quite clear.²⁷

A second case involving dedication of an easement of way was decided by the Western Section of the Court of Appeals during the survey period.²⁸ On this point, the court refused to upset a judgment in favor of plaintiff since there was evidence in the record to support

23. 3 POWELL, REAL PROPERTY 494-95 (1952).

24. *Id.* at 495-99. See also RESTATEMENT. PROPERTY § 504, comment d (1944).

25. 292 S.W.2d 223 (Tenn. App. W.S. 1954).

26. See Green, *Equity—1957 Tennessee Survey*, 10 VAND. L. REV. 1095, 1096 (1957).

27. See 2 WALSH, REAL PROPERTY § 264 (1947).

28. Callahan v. Town of Middleton, 292 S.W.2d 501 (Tenn. App. W.S. 1954).

a finding that plaintiff's property had not been dedicated to a public use. The court also felt that there was evidence to support a finding that there had not been an adverse use of the property involved for the prescriptive period.

Highways and streets usually come into existence through one of the three following methods: (a) dedication, (b) prescription or (c) condemnation.²⁹ In this case plaintiff had donated certain property in front of his place of business to enable the state to widen an existing street. The dispute arose over the area outside the curb line of the street which included a grassy area and a newly constructed sidewalk totaling some twenty feet in width. It was argued by the city that plaintiff did not own this property because, among other things, he or his predecessor in title had dedicated it to public use or to the public.³⁰ While the evidence might well have supported a contrary conclusion as to the question of dedication, the court observed that there was material evidence to support the verdict of the jury and that its duty was, therefore, to sustain it.³¹

Landlord and Tenant: Two opinions by Judge Avery of the Western Section of the Court of Appeals bring into sharp focus what can only be described as an anomalous situation in the law of this jurisdiction. The fact situations in the two cases were strikingly similar. In both cases plaintiffs had sustained injuries from falling through openings designed for fans in attics of houses which they were occupying. In both cases the openings were not apparent and were concealed by unsafe coverings. In both cases plaintiffs were seriously injured. In both cases suit is brought against the owner who had built the houses on the premises. But in the first case³² the court of appeals reversed a judgment for the owner entered on a directed verdict because of a determination that the evidence presented a question for the jury, while in the second case³³ a judgment entered on a directed verdict for the defendant-owner was affirmed. This result was reached even though in the first case the plaintiff had occupied the premises for over fourteen months before sustaining the injuries while in the second case plaintiff had occupied the premises just over one month, not long enough to "unpack all the household furnishings, clothes, etc."

To what can we attribute these seemingly diametric results? The answer is found in the court's conclusion as to the legal relationship of the parties. Fortunately for the lady in the first case, L. I. Boyce, she was a tenant of the defendant; and the defendant landlord, under the Tennessee decisions, has considerable liability in tort for injuries

29. See 2 WALSH, REAL PROPERTY § 267 (1957).

30. 292 S.W.2d at 503-04.

31. *Id.* at 504, 510.

32. *Boyce v. Shankman*, 292 S.W.2d 229 (Tenn. App. W.D. 1953).

33. *McIntosh v. Goodwin*, 292 S.W.2d 242 (Tenn. App. W.D. 1954).

proximately caused by defective condition of the premises.³⁴ Unfortunately for the lady in the second case, Mary McIntosh, she was a purchaser; therefore the defendant vendor owed no duty to disclose to her dangerous conditions of the premises.³⁵

While there might well be a basis for questioning the conclusion of the court in the *McIntosh* case that the existing relationship between the parties was vendor and purchaser, one must admit that the court of appeals had little choice as to the rules to be applied once that determination was made. Under our system of law it is generally accepted that inferior courts are not at liberty to flout clearly existing rules of law. The doctrine of stare decisis applies with full vigor to these lesser tribunals. But, without desiring to be presumptuous, it is suggested that the Supreme Court of this state should review the justification for a continued application of the caveat emptor principle to the sale of land and, if it refuses to do so, that the legislature should act to relieve the incongruous situation now existing. It has been pointed out previously in these survey articles that some modern real estate transactions call for different treatment than was accorded a sale of real estate many years ago.³⁶ It should be noted that, while *Smith v. Tucker* did reflect the state of the law in 1921, the language contained therein, and relied on by the court in the *McIntosh* decision, is no longer accurate.³⁷

Certainty is a very desirable characteristic of law. The measure of a lawyer's success is in many instances the accuracy with which he can predict the legal result which flows from a given fact situation. But the desire for certainty—the need for predictability in the law—the doctrine of stare decisis—should not blind us to the fact that the common law has traditionally grown, expanded and even changed when courts have been persuaded that just results were not being achieved through the application of existing rules and principles. For example, everyone knows that the greatest stimulus to the development of equity was the rigidity which resulted from the desire of the early common law clerks to cram every action into an existing pigeonhole.

34. *Pulaski Housing Authority v. Smith*, 282 S.W.2d 213 (Tenn. App. M.S. 1955); *Willcox v. Hines*, 100 Tenn. 538, 46 S.W. 297 (1898); *Hines v. Willcox*, 96 Tenn. 328, 34 S.W. 420 (1896).

35. See 292 S.W.2d at 249, citing *Evans v. Young*, 196 Tenn. 118, 126, 264 S.W.2d 577, 580 (1953); *Smith v. Tucker*, 151 Tenn. 347, 362, 270 S.W. 66, 70 (1924).

36. See Trautman and Kirby, *Real Property—1954 Tennessee Survey*, 7 VAND. L. REV. 921, 929 (1954); Trautman, *Real Property—1956 Tennessee Survey*, 9 VAND. L. REV. 1089, 1101 (1956).

37. Particular reference is made to the following statement in *Smith v. Tucker* which is quoted in the *McIntosh* case: "[W]hatever may be the reason, no case can be found in the books where the vendor has been held liable in damages to the vendee, or to third persons, for personal injuries arising from defects in the premises." 292 S.W.2d at 249. See Trautman and Kirby, *Real Property—1954 Tennessee Survey*, 7 VAND. L. REV. 921, 932 (1954).

There is a maxim which many regard as portraying the very spirit of the common law. It is that *cessante ratione legis, cessat et ipsa, lex*. It is submitted that the reason for blindly applying the caveat emptor rule to all sales of real estate no longer exists.

In *High Point Coal Co. v. East Tennessee Iron & Coal Co.*³⁸ the Supreme Court was required to determine the intention of the parties with respect to a lease they had executed several years before. The court decided that the lessee's promise to surrender the demised premises with all "tramways" in "good working order and condition" did not entitle the lessor to proceeds from the sale of copper wire which had been installed by the lessee and used for purposes of supplying power to operate the locomotives in the mine. As there was nothing in the lease to indicate that the word "tramway" should be given other than its ordinary and common meaning, the lessor was not entitled to the wire.³⁹

In *Sherman v. Southern Advertising Co.*⁴⁰ a purchaser of certain realty sought a declaratory judgment that a sublease in existence at the time of his purchase was invalid. There were several reasons why the purchaser's petition was demurrable; among these the court pointed out (1) that at time of purchase plaintiff had notice of defendant's (sublessee) equities, (2) that there was no allegation that defendant was in default on any provisions of the lease, (3) that there were no acts of omission of defendant pertaining to the lease in which complainant had any rights and (4) that there was no privity of contract or estate between complainant and defendant sublessee.

The basis of petitioner's complaint grew out of the fact that under the sublease defendant was obligated to repaint and repair certain buildings on the premises, which buildings the petitioners had torn down after the purchase. The position of petitioner was that since the sublessee could not now discharge this duty the consideration had failed. The court treated this matter as one of impossibility of performance and stated the general rule that nonperformance is excused if performance is prevented by conduct of the adverse party.⁴¹ Certainly on these facts there had been a destruction of an essential specific thing, and the same result would follow from its destruction even though it had been a fortuitous occurrence rather than the result of an affirmative act of the adverse party.⁴²

Restrictive Covenants: The most effective and well recognized methods of controlling the use of land are restrictive covenants in deeds and private planning and development that will result in equitable servi-

38. 296 S.W.2d 845 (Tenn. 1956).

39. See 3 WILLISTON, CONTRACTS §§ 607, 613-14 (rev. ed. 1936).

40. 292 S.W.2d 36 (Tenn. 1956).

41. *Id.* at 38.

42. 6 WILLISTON, CONTRACTS § 1948 (rev. ed. 1938).

tudes. The Tennessee Supreme Court has had occasion in the past to rule upon the extent to which such restrictions are enforceable, and in the truly landmark decision of *Ridley v. Haiman*⁴³ the court committed itself to a vigorous enforcement of them. Where the general plan is apparent from the deeds any of the grantees of a lot in the tract can enforce the restriction against any other grantee.

During the survey period the Supreme Court again had occasion to consider the effectiveness of restrictive covenants in controlling the use of real property and, in its decision in *Hackett v. Steele*,⁴⁴ reaffirmed the position taken in *Ridley v. Haiman* on the question of the right of all grantees in a subdivision to enforce the covenants against all other grantees. In the *Hackett* case every deed in the subdivision contained language indicating the intent of the parties to these deeds that each grantee have the right to enforce the restrictions. Even without such language the overall plan for limiting the subdivision to residential use was apparent, and it is submitted that intent could be found from this fact.

The *Hackett* case is extremely significant because for the first time the Supreme Court treated directly the question of the right of a grantee whose property is burdened by one of these restrictive covenants to have such burden removed when the character of the neighborhood in which his property is located has changed so drastically that the value of his property when limited to the restricted use is seriously depreciated. In this case, the court affirmed the decree below and in effect held that complainant had failed to state a cause of action.

There are a number of jurisdictions where the courts have held that landowners burdened by restrictive covenants or equitable servitudes were no longer under any duty to comply with the restrictions because it was felt that changes in the character of the surrounding neighborhood made enforcement of the restrictions oppressive and inequitable.⁴⁵ In several of these cases the action of the court has been of such nature as to terminate completely the restriction, whereas in others the court has denied injunctive relief but awarded damages or denied injunctive relief and left the party to an action at law on the breach of the covenant. It is probably accurate to say that there is a trend in the American courts toward a recognition of the fact that conditions can develop which will justify a court in refusing to enforce these restrictions. While the court in the *Hackett* case recognized this fact and indicated that it might in some instances grant relief, the decision appears to have the net effect of being quite vigorous in its support of this method of restricting land use.

43. 164 Tenn. 239, 47 S.W.2d 750 (1932).

44. 297 S.W.2d 63 (Tenn. 1956).

45. 2 AMERICAN LAW OF PROPERTY § 9.39 (Casner ed. 1952); See Annots., 4 A.L.R.2d 1111 (1949), 88 A.L.R. 405 (1934).

Assuming that relief from the burden of such restrictions is available, the important question is just what must the landowner allege and prove to be entitled to it. Some of the decisions have stated that the change in the character of the surrounding neighborhood must be such as "to make it impossible any longer to secure in a substantial degree the benefits sought to be realized through the performance of the building restriction."⁴⁶ Other courts have stated that the change must be such as to render the restriction "valueless to the owner of the benefited land and oppressive or unreasonable as to the owner of the burdened land."⁴⁷ In the *Hackett* case the Tennessee court said that the change alleged and proved must be such "that the purposes of the restrictive covenants relating to the entire subdivision have become burdensome and are not being maintained for the benefit of the owners of the lots."⁴⁸ It would seem that such a situation will rarely occur and that for practical purposes there is little likelihood that a burdened owner in this jurisdiction will receive relief if the court stands fast on this test. Even though the cases where restrictive covenants are detrimental and increasingly burdensome to property owners on the outlying edges of restricted areas have and will continue to become more numerous, much can be said in support of the view expressed by the Supreme Court in the *Hackett* case. It prevents a piecemeal erosion of a planned area leading to its eventual defeat. The restrictions are treated as enforceable as against all of the land embraced by them or against none of it.

This view carries out the plan of the subdivider, which provided a greater protection to the interior lots than to the border ones. This difference of protection determined the purchase price paid in the original sales by the common grantor. To permit the border lot owners to later renege on their bargain to the detriment of the interior lot owners is to give them an economic advantage that they did not pay for.⁴⁹

Miscellaneous: In *Butler v. Holland*⁵⁰ the Supreme Court observes that registration of a deed is notice to all the world of the conveyance it purports to represent and that such conveyance cannot, therefore, be attacked as fraudulent by creditors who contract debts with the grantor subsequent to such registration.⁵¹

In *Lowe v. Wright*⁵² the Middle Section of the Court of Appeals re-

46. 2 AMERICAN LAW OF PROPERTY § 9.39 (Casner ed. 1952).

47. *Ibid.*

48. 297 S.W.2d at 68.

49. 2 AMERICAN LAW OF PROPERTY § 9.39 (Casner ed. 1952).

50. 289 S.W.2d 701 (Tenn. 1956).

51. See *Long v. True*, 149 Tenn. 673, 261 S.W. 673 (1924); *Nelson v. Vanden*, 99 Tenn. 224, 42 S.W. 5 (1897). The reason for this result is that under such circumstances (knowledge or notice of creditor, actual or imputed) the creditor cannot be regarded as "hindered, delayed or defrauded" by such transfer.

52. 292 S.W.2d 413 (Tenn. App. M.S. 1956).

states a proposition apparently well established in Tennessee that, while the Statute of Frauds requires an agent's authority to execute a deed to be by deed or by writing of equal formality with a deed, the authority of an agent to contract to sell land in the name of the principal need not be in writing. In this case the agent had forged a deed as part of a scheme to defraud both his principal and the purchaser. Ordinarily a forged deed would be absolutely void, and it appears that the court did not dispute this proposition. But the evidence led the court to conclude that the agent did have authority to contract for the sale of the property involved although such authority was not in writing and that while the purchaser did not acquire any interest in the real estate by virtue of the forged deed, he did acquire an equitable interest by virtue of the contract for sale entered into with the owner's agent. The complainant owner cannot clear his title without restoring to the purchaser the money collected by his agent under the valid contract.⁵³

This case should also be required reading for all notaries and other officers who take acknowledgments to deeds. All too often notaries, intending to lessen inconvenience to parties and acting under the illusion that they are befriending an attorney or real estate broker, find too late that they have been imposed upon. This case shows the risk that a notary runs in not requiring all acknowledgments to be made in his presence and in not taking precautions to determine that those making acknowledgments are who they purport to be.

The Eastern Section of the Court of Appeals in *Nicely v. Nicely*⁵⁴ discussed the right of tenants in common to a partition of real estate held by them. In this case there were seven cotenants. One had an undivided one-half interest in the real estate and the rest were entitled to one-twelfth each. The chancellor had overruled the master's report and judgment that the facts called for a sale for partition rather than a partition in kind and had directed a partition in kind which resulted in the eventual division of the tract into two parcels, one of which tracts the appellants elected to take, under protest, as tenants in common in fee simple. The court of appeals reversed the chancellor for the reason that under the statute the court has no power to allot a certain tract of land to a group "to be held as tenants in common by them *without their consent*"⁵⁵ and for the further reason that the weight of proof overwhelmingly supported the master's finding that the tract was not susceptible to partition in kind. The case presents a clear and concise interpretation of the code sections involved.⁵⁶

53. *Id.* at 419.

54. 293 SW.2d 30 (Tenn. App. E.S. 1956).

55. *Id.* at 32-33.

56. TENN. CODE ANN. §§ 23-2101 to -2104 (1956).

In *Stratton v. Conway*⁵⁷ the Supreme Court affirmed a judgment sustaining a demurrer to the declaration of a landowner in Shelby County who was suing an adjoining landowner and a real estate broker to recover damages for sale of realty to Negroes in an exclusively white neighborhood. The case presented the somewhat novel proposition that, even conceding the legal right of an owner to sell his property to Negroes if he desired to do so, a sale by a landowner that results in the depreciation in value of surrounding property is actionable and such owner is liable in damages to his neighbor for such damage. The court, amply supported by authorities, concluded that this is a case of damage without injury.

In *Allen v. Goldstein*⁵⁸ the court of appeals affirmed the decree of the chancellor refusing to set aside the foreclosure of a trust deed. Extensive quotations from the record support the conclusion of the court that the evidence was not sufficiently clear and convincing to justify the action sought.

*Harris v. Dobson-Tankard Co.*⁵⁹ gave the court of appeals an opportunity to restate several well-established propositions of law. The first of these is that a purchaser at a foreclosure sale of mortgaged property is charged with notice of the claims of those in active physical possession of the property at the time of the sale.⁶⁰ The second proposition is that a tenant holding under an oral lease from month to month is entitled to notice to quit and that without such notice the tenant's holding is not unlawful.⁶¹ The third proposition is that an eviction of a tenant without first giving the five days notice to which he is entitled by virtue of the relationship is actionable.⁶²

*Evans v. Young*⁶³ presented a perplexing and difficult problem to the Supreme Court of Tennessee. The court was called upon to determine whether collateral heirs of a Negro born of slave parents would inherit real property left by him upon his death or whether such property would go to his widow under the provisions of Code section 31-103.

The question was complicated by the fact that prior decisions construing applicable statutes had been to the effect that the right of inheritance extended only to legitimate children of former slave parents and not to collateral kin. The court in a lengthy opinion held in favor of the collateral heirs emphasizing the fact that the legislature had, subsequent to their prior interpretation of Code section 31-102,⁶⁴ enacted section 31-303, which they felt indicated an intent to extend

57. 301 S.W.2d 332 (Tenn. 1957).

58. 291 S.W.2d 596 (Tenn. App. W.S. 1956).

59. 298 S.W.2d 28 (Tenn. App. M.S. 1956).

60. *Id.* at 31.

61. *Id.* at 32.

62. *Ibid.*

63. 299 S.W.2d 218 (Tenn. 1957).

64. TENN. CODE ANN. § 31-302 (1956).

the right of inheritance to collateral kindred of a deceased Negro. There was a vigorous dissent by Justice Swepston whose opinion was to the effect that the court had reached "an absurd result never intended by our Legislature."⁶⁵

Legislation: In 1955 the Tennessee Supreme Court in the case of *First Federal Sav. & Loan Ass'n v. Dearth*⁶⁶ held that a purchaser for value from an heir of a decedent runs the risk that subsequent to the purchase a will may be found and probated wherein decedent devised the real estate to someone other than the purchaser's grantor. In the *First Federal* case the devisee of the unrecorded, subsequently found, will prevailed over the purchaser for value from the heir. The significance of this decision was pointed up in excellent fashion by the writer of the survey article appearing in the *Vanderbilt Law Review* last year.⁶⁷ In this article Professor Trautman suggested that legislation might well be in order designed to protect a bona fide purchaser for value when he (1) purchases from the heir as against an unprobated will, (2) purchases from a devisee named in a probated will as against heir who later successfully contests the will and (3) purchases from the devisee of a probated will as against the devisee named in a will later admitted to probate.

There is no question but that such legislation would tend to stimulate commercial transactions of real estate, for lending institutions in particular are now most sensitive to the risk they run in lending to an heir of an apparent intestate or to a devisee shortly after his testator's death. The Eightieth General Assembly was conscious of the problem involved, for during its sessions an amendment to section 30-610 of the Tennessee Code was enacted.⁶⁸ This amendment tends to eliminate some, although not all, of these risks heretofore run by the purchaser for value from an heir or devisee of real estate and in addition tends to clarify the position of a creditor of a decedent with respect to real estate which decedent owned at the time of his death.

Section 1 (1) of the act provides that a mortgagee or purchaser for value from the heir or devisee of a decedent takes subject to the right of any unsatisfied creditor of decedent to subject the realty to payment of his claim for a period of one year. In the event an administration on the decedent's estate is granted within one year of decedent's death, then claims of creditors ultimately established as valid obligations of the estate in such administration shall constitute a lien on realty of decedent in the hands of an heir or his alienees.

Section 1 (2) of the act provides that a mortgagee or purchaser for

65. 299 S.W.2d at 228.

66. 279 S.W.2d 503 (Tenn. 1955).

67. Trautman. *Real Property—1956 Tennessee Survey*, 9 VAND. L. REV. 1089, 1089-92 (1956).

68. Tenn. Pub. Acts 1957, c. 118, § 1.

value from the heir of a decedent shall take title free from the right of non-lien creditors to proceed against such property where one year has elapsed without an administration and the mortgagee or purchaser takes without actual knowledge of the debt.

Section 1 (3) provides that after one year from the date of decedent's death a mortgagee or purchaser for value from the heir of a decedent shall take free from the title, right or claims arising out of an unprobated will unless such mortgagee or purchaser has actual knowledge of the existence of the unprobated will.

There was other legislation of less general concern about which no comment is made in this article.⁶⁹

69. See Tenn. Pub. Acts 1957, c. 19, § 3, TENN. CODE ANN. § 70-2001 (Supp. 1957) (statute creating a Division of Water Resources in the Department of Conservation aimed at facilitating and developing basic water resources policies for the state); Tenn. Pub. Acts 1957, c. 194, § 1, TENN. CODE ANN. § 49-113 (Supp. 1957) (statute authorizing leasing of public lands under jurisdiction of Department of Education to fraternities and sororities); Tenn. Pub. Acts 1957, c. 298, § 1, TENN. CODE ANN. § 23-1526 (Supp. 1957) (statute authorizing state, counties and municipalities to pay into court money in condemnation cases to stop running of interest and authorizing owner of condemned property to withdraw such money without prejudice to his rights).