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Real Property -- 1956 Tennessee Survey

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REAL PROPERTY—1956 TENNESSEE SURVEY

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TITLES AND DEEDS

Bona Fide Purchases Without Notice: There were two cases, *First Federal Savings and Loan Ass'n v. Dearth*[1] and *Harris v. Buchignani*,[2] decided during the year which concerned the title acquired by a purchaser of real property without actual notice of an unrecorded interest. The first of the above cases concerned a purchaser from the heir of the deceased record owner, and the second concerned a purchaser from a record owner who had previously executed a contract of sale which was not recorded. Both cases originated in Memphis.

(1) In the *First Federal* case the record owner of a house and lot died in 1951 leaving her son as her sole heir at law. Three months and eight days later the son, believing that his mother had died intestate, made application to First Federal for a loan to be secured by a mortgage on this property. The application was approved upon an affidavit of heirship executed by the son and the note and mortgage were executed. Eight months after the death of the record owner, however, her will was found in the lockbox of the father of a Memphis attorney. The will gave all of the decedent's property to her son for life, remainder to her two grand-children, children of the son. The First Federal was apparently not informed that a will had been found until some nine months later when the son died and the mortgage note was in default.

First Federal filed this bill in chancery for a decree that its deed of trust was a valid first mortgage on the property. The guardian ad litem for the minor remaindermen opposed the bill on the ground that their father could not mortgage more than the life estate he owned under the will. The chancellor held for First Federal. The Western Section of the Court of Appeals reversed and held for the devisees under the will, and the Supreme Court of Tennessee affirmed the court of appeals, thus holding that a purchaser for value from an heir without notice of a will does not have priority in title over the devisees in the unrecorded, subsequently found will of the record owner.

The decision of the court seems to rest upon two propositions, namely, (1) that there is no statute of limitations in Tennessee limiting the time in which a will must be probated, and (2) because of the relatively short period of three months and eight days between the death of the record owner and the application for loan by the heir,

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1. 279 S.W.2d 503 (Tenn. 1955).
2. 285 S.W.2d 108 (Tenn. 1955).

First Federal had not sustained the burden of showing "the bona fides" of the purchase by making a diligent search and inquiry as to whether the decedent left a will. The court refuses to accept as the rule in all cases that "the test is whether or not the purchaser acquired his title a *reasonable time* after the death of the ancestor under the circumstances of the particular case." Also distinguished was the case of *Wright v. Eakin*[3] decided by Chief Justice Green in 1925 in which the heir sold the land eleven years after the death of the decedent record owner, and the will was not probated until nineteen years after the death of the record owner. The basis of distinguishing that case is said to be (1) the relatively short period of three months and eight days in the instant case, and (2) that a careful examination of that opinion leads the court to conclude in the instant case that "the doctrine of adverse possession" influenced the decision in *Wright v. Eakin.* While the latter point does not appear in the opinion of *Wright v. Eakin,* it may also be pointed out that the opinion of Chief Justice Green in that case was reasoned upon the analogy of the title acquired by the purchaser of personal property from the administrator of a decedent's estate as against legatees named in a subsequently probated will. Traditionally in Anglo-American law the title to personal property of a decedent passes to the personal representative of the decedent, whereas the title to real estate passes directly to the devisee named in a will from the time of death. There is therefore a somewhat better basis for substantiating the title acquired by a bona fide purchaser of personal property from the administrator as compared to the title acquired by a similar purchaser of real property from the heir.

The important significance of the instant case of *First Federal Savings & Loan Ass'n v. Dearth* is that it points up in sharp focus what has long been a substantial hazard in approving a title which is based upon a conveyance of real property by the heir of a deceased record owner.[4] How can you ever be sure that a will will not be belatedly probated, giving the property to others? Does this mean that such titles are not marketable, and that real property which apparently passes by intestate succession is effectively excluded or at least retarded from the free flow of commercial investments in land for years and years until healed by the time cure of the adverse possession concept? Title insurance would seem to be an effective risk shifting device in this situation if, but only if, it is available and the title policy purchased covers this title risk. There is a vast difference in the coverage of title insurance policies now being sold.

The probate process is a "proceeding" as distinguished from an "action," so that the general statute of limitations is not usually appli-

3. 151 Tenn. 681, 270 S.W. 992 (1925).
4. ATKINSON, WILLS § 94 (2d ed. 1953); 10 MINN. L. REV. 168 (1926).

cable.[5] In the absence of legislation there is no time limit after the decedent's death within which a will may be probated. The cases in other states are divided on the problem in the instant case, however; although the result reached here is regarded as usual by leading commentary.[6] In its refusal to follow the decision of *Wright v. Eakin* the court casts some doubt on a decision which has been considered a leading case for the opposite result.[7] Bona fide purchasers from the heirs at law are often protected by statute when they purchase before probate of the will, but later than a designated period of time after the death of the record owner. Under this type of legislation the buyer may safely assume that the decedent died intestate when no will has been probated within the time limit. Such legislation would be analogous to the Tennessee statute which protects a bona fide purchaser for value without notice and creditors of a record owner against prior unrecorded deeds, mortgages and other instruments,[8] except that such a statute would be a period of grace-notice statute rather than a notice statute. Perhaps closer still is section 64-2604 of the Tennessee Code which seems to protect innocent purchasers from either the heir or devisee against the grantee of a prior unrecorded deed, or other instrument entitled to record, executed prior to death by the deceased record owner, unless such deed or instrument is registered within ninety days following the death of the record owner. It would seem that this statute could and should be amended so as to allow the period of ninety days after which bona fide purchases for value would be protected (1) in purchasing from the heir as against an unprobated will, (2) in purchasing from the devisee named in a probated will as against the heir who later successfully contests the will,[9] and (3) in purchasing from the devisee of a probated will as against the devisee named in a will later admitted to probate. The mortgage banking and title insurance industries should be interested in supporting such legislation. Such legislation would not invalidate the unprobated will after the time limit; it would only protect the bona fide purchaser. In a few jurisdictions, however, there are statutes forbidding probate of a will after a certain length of time; and such statutes are upheld.[10]

Without such legislation some states seem to draw a distinction between cases where there has been an administration of the estate and thus an adjudication of intestacy before the sale by the heir,

5. Barnhardt v. Morrison, 178 N.C. 563, 101 S.E. 218 (1919); Alsobrook v. Orr, 130 Tenn. 120, 169 S.W. 1165 (1914).

6. ATKINSON, WILLS § 94 n.8 (2d ed. 1953); Annot., 22 A.L.R.2d 1107 (1952).

7. See note 6 *supra*.

8. TENN. CODE ANN. §§ 64-2401 to -2603 (1956).

9. See Reeves v. Hager, 101 Tenn. 712, 50 S.W. 760 (1899).

10. See note 6 *supra*.

and cases where there has been no adjudication of intestacy.[11] While this would tend to compel the grant of letters of administration in order to make the title acceptable, it would seem to be no more than a formality unless the pending commercial transaction is delayed until the period of administration is completed. The ninety day period of grace type statute would protect a bona fide purchaser in somewhat less time than that.

In conclusion, then, with respect to *First Federal Savings and Loan Ass'n v. Dearth,* while the decision reaches the result usually considered proper upon the basis of logic and in the absence of a statute, and it rejects the uncertainty of title marketability implicit in the "reasonable time" doctrine of *Wright v. Eakin,* it seems quite clear that legislation is badly needed to correct this result so as to protect the bona fide purchaser after a designated period of time; otherwise the marketability of real estate titles passing through transfer by intestate succession will be retarded, and values unnecessarily depressed.

(2) The case of *Harris v. Buchignani*[12] has been the subject of a previous comment by the writer[13] in the 1954 Tennessee Survey on Real Property. The comment then was upon the opinion of the Western Section of the Court of Appeals when the case was styled *Robinson v. Harris,*[14] in which that court speaking through Judge Anderson, used the champertous deed concept to accomplish what was considered to be the just result. While the result reached by that court was not questioned in the Tennessee Survey article, the necessity of using the champertous deed concept to reach the desired result was questioned.[15] When Robinson took a nonsuit, the style of the case below was changed to *Buchignani v. Harris,* and thus the champertous deed problem was eliminated. The Supreme Court in the instant case of *Harris v. Buchignani,* with the champerty problem eliminated, reaches an opposite result from the decision of the court of appeals. and this points up the question raised by this writer in the 1954 Tennessee Survey article as to whether or not the result reached by the court of appeals should not have been based upon a different theory.[16]

11. *Compare* Eckland v. Jankowski, 407 Ill. 263, 95 N.E.2d 342 (1950), 29 CHI.-KENT L. REV. 265 (1951), 49 MICH. L. REV. 1089 (1951); Simpson v. Cornish, 196 Wis. 125, 218 N.W. 193 (1928), 14 IOWA L. REV. 111, 27 MICH. L. REV. 118, 12 MINN. L. REV. 768, *with* Cole v. Shelton, 169 Ark. 695, 276 S.W. 993 (1925); Reid's Adm'r v. Benge, 112 Ky. 810, 66 S.W. 997 (1902); Colley v. Lee, 170 N.C. 18, 86 S.E. 720 (1925). *Contra,* Wright v. Eakin, 151 Tenn. 681, 270 S.W. 992 (1925), 10 MINN. L. REV. 168 (1926).

12. 285 S.W.2d 108 (Tenn. 1955).

13. Trautman and Kirby, *Real Property—1954 Tennessee Survey,* 7 VAND. L. REV. 921 (1954).

14. 260 S.W.2d 404 (Tenn. App. W.S. 1952).

15. See Trautman and Kirby, *supra* note 13, at 922-23.

16. *Ibid.*

The facts of the case as appearing from the two published opinions are that Simms owned the land, and in 1925 he executed a contract of sale to Martha Harris, "an ignorant and wholly illiterate old negress."[17] It was stipulated that Harris "was in possession and living on this property from 1925 on up until the present litigation was started."[18] In 1926 Simms executed a deed of trust on acreage which included the five acres sold under the contract to Harris to the Union Planters Bank and Trust Company as trustee to secure an indebtedness. In 1928 Simms executed a warranty deed to Harris, which was recorded. In 1929 the bank foreclosed its deed of trust and executed a deed to Buchignani. This is an ejectment suit against Harris filed in 1951. While there was a considerable amount of litigation during the period of 1929 and 1951 between the above parties and others concerning the title of Harris, the above facts seem to constitute the full basis of both published appellate court opinions.

The Supreme Court, in holding for Buchignani, seems to hold that the deed of trust to the bank in 1926 cuts off the equitable title of Harris under the 1925 contract of sale. Since a deed of trust in Tennessee conveys a legal title, this result would seem to follow only if the bank was a bona fide purchaser for value, without notice of the equitable title of Harris. It has been traditional in Anglo-American law[19] and in Tennessee[20] that possession of a person not the record owner is notice to a purchaser of real property so as to put him upon inquiry of the rights of the possessor. Indeed, the rule extends to cases where the possession is not human occupancy and is evidenced only by cultivation, use of pasturage, cutting timber, and other uses.[21] It would seem therefore that both the Bank and Buchignani were put upon inquiry notice of the equitable title of Martha Harris by her possession of the land as stipulated. The opinion of Mr. Justice Burnett, however, does not even consider the significance of the possession of Harris in relation to the instant question of priority title. In the 1954 Tennessee Survey article the writer pointed out that the possession of Harris would seem to make unnecessary the use of the champertous deed concept in order to reach the result decided by the court of appeals.[22] From the facts set forth in the opinion of the Supreme Court, the decision in *Harris v. Buchignani* seems difficult

17. See opinion of Judge Anderson, 260 S.W.2d at 409.
18. See opinion of Mr. Justice Burnett, 285 S.W.2d at 110.
19. 4 AMERICAN LAW OF PROPERTY §§ 17.12-.15 (Casner ed. 1952); 2 POMEROY, EQUITY JURISPRUDENCE § 614 (1941).
20. Macon v. Sheppard, 21 Tenn *335 (1841). See excellent opinion of Judge Swepston in Nikas v. United Constr. Co., 34 Tenn. App. 435, 239 S.W.2d 41 (W.S. 1950) (reviewing several other Tennessee cases). See also 15 MICHIE'S TENN. DIGEST, *Vendor and Purchaser* § 71 (1938, Supp. 1955); Trautman and Kirby, *supra* note 13, at 923 n.12.
21. 4 AMERICAN LAW OF PROPERTY § 17.15 (Casner ed. 1952).
22. Trautman and Kirby, *supra* note 13, at 922-23.

to reconcile with a well established doctrine in Tennessee and elsewhere. A justification for the departure is not apparent from the fact of the opinion.

Delivery of Deeds—Presumption from Registration: There were two cases, *Thornton v. Thornton*[23] and *Ellison v. Garber*,[24] which considered the effect of the registration of a deed by the grantor in relation to the requirement that there must be a delivery of the deed in order for the conveyance to be effective. For there to be a transfer by deed, the instrument must first be drafted in form to be effective as a conveyance, then it must be duly executed; following which there must be a proper and sufficient delivery of the instrument. Except as a grantor may be estopped to deny it, delivery by him is absolutely essential to a transfer of title.[25] The general rule is that words or conduct of the grantor which evidence his intention to make his deed presently operative and effectual so as to vest title in the grantee and to surrender his own control over the title amount to delivery. It is said that the least questionable proof is a manual transfer of the instrument by the grantor to the grantee,[26] but proof of this will always rest upon oral evidence. The "manual transfer" may be by mail, or, indeed, without even the knowledge of the grantee. It is sometimes held that delivery may be made by the unilateral act of the grantor recording the instrument.[27] Since proof of a valid delivery will always depend completely upon parol evidence under our traditional Anglo-American system, it seems clear that the unilateral act of recording by the grantor alone constitutes at best a mere presumption of a valid delivery. But this presumption can be, and frequently is overcome by the evidence, and the careful purchaser will want to avoid the ambiguity implicit in recordation alone as evidence of delivery.

If recording the instrument raises only a presumption of a valid delivery, what circumstances or evidence will be held to overcome the presumption? Significantly, in both of the cases decided during the period in question there was evidence that the grantor in each case was concerned about creditors' rights.

In *Thornton v. Thornton* Father made a deed to Wife for life, reversion to Father, but if Father predecease Wife, remainder to Son A in fee simple. The deed was recorded and later in the year Father was adjudicated a bankrupt. The present action, however, is brought by Son B, after the death of both Father and Wife, against Son A to declare the deed invalid, Father having predeceased Wife. The West-

23. 282 S.W.2d 361 (Tenn. App. W.S. 1955).
24. 287 S.W.2d 564 (Tenn. App. E.S. 1956).
25. 3 AMERICAN LAW OF PROPERTY § 12.64 (Casner ed. 1952).
26. *Ibid.*
27. 3 *id.* § 12.64 n.11.

ern Section of the Court of Appeals indulged the presumption of delivery from registration of the deed and held that there was no evidence to overcome it. Actually, it was said that "the only serious question involved in this cause"[28] was whether the contingent remainder to Son A was a gift or an advancement.

In *Ellison v. Garber,* however, Father executed deeds to various lands to Mother on July 7, 1926, and these were registered on July 9th following by Father. Mother died intestate in 1932 leaving Father and five children, one of whom was Saul, the plaintiff's husband. Saul died testate in 1942 devising all of his estate to the plaintiff. After the execution of these deeds in 1926 Father continued to manage these properties, received the rentals from them, had them assessed in his name and paid the taxes and insurance on them, executed leases, and occupied and controlled them. He continued to do so after Mother's death in 1932 until his own death in 1950. The first knowledge that any of the children had of the 1926 deeds was when Father's safety deposit box was opened after his death in 1950, and the chancellor concluded from the evidence that Mother had never known of the execution of the deeds. It was intimated that Father was motivated in 1926 by the fact that the local banks had been put in the hands of a receiver, and that Father was indebted to the bank; but the court refuses to attach any significance to this. The Eastern Section of the Court of Appeals reviews the Tennessee cases which have variously held (1) that registration was equivalent to actual delivery,[29] and (2) that registration raises a presumption of delivery,[30] and upon the above evidence concludes that the presumption was overcome so that there was no valid delivery by Father. Accordingly, the plaintiff, who had remarried, took no interest, and the property was kept within the family.

The case is interesting because it demonstrates that the presumption of delivery arising from the registration of a deed can be overcome by evidence that the deeds were retained in the possession of the grantor and evidence that the grantor retained managerial control over the property.

Adverse Possession Among Co-Owners: There were two cases, *Wilson v. Clark*[31] and *Moore v. Cole,*[32] which concerned deeds executed

28. 282 S.W.2d at 365.
29. McEwen v. Troost, 33 Tenn. *186 (1853).
30. Battle v. Claiborne, 133 Tenn. 286, 180 S.W. 584, 589 (1915); Davis v. Garrett, 91 Tenn. 147, 18 S.W. 113 (1892); Mason v. Holman, 78 Tenn. 315 (1882); Thompson v. Jones, 38 Tenn. *574 (1858); Cox v. McCartney, 34 Tenn. App. 235, 236 S.W.2d 736 (M.S. 1950); Couch v. Hoover, 18 Tenn. App. 523, 79 S.W.2d 807 (M.S. 1934).
31. 288 S.W.2d 740 (Tenn. App. W.S. 1954).
32. 289 S.W.2d 695 (Tenn. 1956). This case was actually published in the June 5, 1956 issue of the South Western Reporter advance sheet, and therefore is beyond the June 1 cut-off date for cases subject to this Survey. Be-

during the hiatus period between December 31, 1913 and April 15, 1919 when tenancies by the entirety were abolished in Tennessee, resulting in the problem of whether, and under what circumstances, one tenant in common will acquire title by adverse possession from the heirs of a deceased tenant in common. Both cases came from Memphis.[33]

In *Wilson v. Clark*, Summers executed a deed in 1916 to James Bent and Fannie Bent. The grantees were husband and wife, and they went into possession immediately. In 1923 Summers executed a second deed to the same property to James Bent and wife, Fannie Bent. Both deeds were registered apparently immediately after execution and delivery. The Western Section of the Court of Appeals said that it could think of no other reason the Bents would have obtained a second deed to the same property in 1923 unless both had been advised that tenancies by the entirety were abolished between 1913 and 1919, and their purpose therefore was to hold this land as tenants by the entireties. James Bent died in 1939 and Fannie Bent died in 1942. Between 1923 and 1939 the Bents had executed several deed of trust mortgages on the property in which their source of title was referred to as the 1923 deed, and in 1940 Mrs. Bent executed a deed of trust mortgage in which the source of title reference was to the 1916 deed. After Mrs. Bent's death in 1942 her administratrix managed the property and collected rents until this partition suit was filed by one of the heirs of Fannie Bent. Eventually the heirs of James Bent were brought into the case, and they contended that James Bent and Fannie Bent owned as tenants in common under the 1916 deed.

The court of appeals first seems to hold that the execution of the second deed in 1923 to the husband and wife by a grantor, who admittedly had no title, nevertheless successfully effected a transfer to the grantees of the title of an estate by the entireties on the theory of estoppel. It is somewhat difficult to understand how the theory of estoppel effected this transfer, and apparently the court of appeals felt that some additional support was needed as it then held that "However, in our opinion, upon the death of James Bent in 1939, the interest of Fannie Bent ripened into a fee based upon more than seven years' adverse possession by her and James Bent under registered color of title, to wit, the deed of date September 17, 1923."[34] The acquisition of a title as tenants by the entireties by Mr. and Mrs.

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cause it is a Supreme Court decision, however, and because it seems to be contrary to a basic assumption in the other decision discussed herein of *Wilson v. Clark, supra* note 31, it was decided to consider both of them in the current issue of the Survey.

33. It is possible that both cases involve properties in the same subdivision since one case concerned property on Trigg Avenue in Memphis and the other case concerned a lot in Trigg Avenue Place Subdivision in Memphis.

34. 288 S.W.2d at 744.

Bent against themselves as tenants in common seems even more remarkable than the acquisition of title by estoppel. To gain title in this manner the adverse possessor must commit a legal wrong which is not only a trespass but so continuous as to give rise to an action of ejectment. Unless the true owner has in fact a cause of action for ejectment and sleeps on it for the statutory period, title by adverse possession cannot be acquired. Permissive possession will not ripen into a title by adverse possession. It is difficult to suppose that Mr. and Mrs. Bent as tenants in common did not consent to their claim as tenants by the entireties. In order to correct the 1916 deed they would have done better if they had made a deed to X as trustee for the purpose of reconveying to them as tenants by the entireties, and the trust deed was then executed and delivered. It may be that the court of appeals could have reached the same result by use of the theory that the conduct of Mr. and Mrs. Bent evidenced an intent to create an oral trust in the land to hold for the benefit of themselves as equitable tenants by the entirety. While an express trust would be difficult to sustain on these facts, an implied trust would seem to be a possibility.

In *Moore v. Cole* there was a deed in 1914 to R. D. Casey and Elizabeth Casey, which was recorded. The Caseys were husband and wife and Mrs. Casey died in 1927. Mr. Casey married a second wife, Eva Casey, and in 1941 Robert Casey and Eva Casey executed a deed to X, who immediately executed a deed to Robert Casey and Eva Casey. Robert Casey died in 1950 devising the property to Eva Casey in fee simple. This was a suit to quiet title and the contest was between the heirs of the first wife, Elizabeth Casey, and the second wife, Eva Casey. The latter contended that the 1941 deed to X and the reconveyance by X to Robert Casey and Eva Casey was a sufficient notice to the heirs of Elizabeth Casey that Robert and Eva claimed an exclusive fee simple by adverse possession so as to start the running of the seven year statute of limitations.[35]

The Supreme Court of Tennessee, in reversing the Western Section of the Court of Appeals, and holding for the heirs of Elizabeth Casey, the first wife, points out clearly the difficult proof requirement necessary in order to sustain a claim of adverse possession by one co-owner against other co-owners. Since each co-owner is entitled to possess all of the land, and the possession of one co-owner is regarded as to the possession of all, there is seldom evidence of an actual ouster by the one in possession. Mere possession and use of the entire property by one cotenant is not an ouster, nor is his possession adverse, so long as the other cotenants remain voluntarily out of

35. TENN. CODE ANN. § 28-201 (1956); See Note, *Title By Adverse Possession in Tennessee,* 5 VAND. L. REV. 621 (1952); 5 VAND. L. REV. 818 (1952).

possession, and are not kept out of possession by the acts of the possessor-tenant.[36] It is also essential that the tenants out of possession have adequate notice of those acts establishing the adverse character of the ousting tenant's possession. Because of the general principle that the possession of one is the possession of all, each tenant has the right to assume that the possession of any other cotenant is not adverse.

After pointing out in the instant case that much stronger evidence of an actual ouster is required in order for one cotenant to oust other cotenants, the court holds that the constructive notice arising from the registration of the 1941 deeds from Robert and Eva Casey to X and from X back to Robert and Eva Casey was not adequate notice to the heirs of Elizabeth, who were cotenants with Robert. The court first distinguishes actual notice and the constructive notice arising from recording the deed. There was no actual notice here. With respect to constructive notice, the court distinguished cases where one cotenant makes a deed conveying a fee simple to a stranger, who takes possession, and cases like the instant case where the cotenant simply causes deeds to be recorded, but remains in possession. In the former situation the recording of the deed to the stranger and his exclusive possession are held to give constructive notice to the cotenants out of possession, while the recording of deeds in the latter situation does not.

The opinion of Mr. Justice Burnett and the short concurring opinion of Mr. Justice Swepston in *Moore v. Cole* are thorough and well reasoned. There is some contrast between them and the opinion in *Wilson v. Clark*. The opinion in the latter case evidences a rather common mistake of concluding that long possession alone will result in the acquisition of title by adverse possession. Unless you can point to someone who could sustain an action of ejectment during this period of possession, title cannot be so acquired. It might be somewhat helpful to point out that the acquisition of title by adverse possession is one of the few places in Anglo-American law where one can sustain his assertion of a legal right only by proving that he has committed a legal wrong.

Oral Agreement Fixing Boundary Line: The case of *Winborn v. Alexander*[37] concerned the validity of an oral agreement fixing a designated line as the true boundary line between adjoining lots. The agreement was upheld on the theory of estoppel even though not made directly by the adjoining lot owners, and the Statute of Frauds was held not to be applicable.

The plaintiffs owned lot A and the Welsh family owned lot B, which was immediately to the west of lot A. The plaintiffs contended

36. 2 AMERICAN LAW OF PROPERTY § 6.13 (Casner ed. 1952).
37. 279 S.W.2d 718 (Tenn. App. W.S. 1954).

their western boundary was some 80 to 90 feet further west than the Welsh family ever agreed to. The area in dispute was in possession of the Welsh family. X wanted to buy the eastern half of lot B and agreed with C. S. Welsh that the latter would obtain a partition decree allocating to himself the eastern half of lot B and that he would then sell it to X. X knew about the dispute between the plaintiffs and the Welsh family. Desiring to avoid litigation and trouble, he went to plaintiffs and compromised with them by agreeing that his northeast corner and plaintiff's northwest corner would be located at a designated and marked point "in the south margin of Water Street." The effect of this was to give plaintiffs a strip sixty feet further west than ever agreed to by the Welsh family and sixty feet further west than the possession of the plaintiffs to that date. This orally agreed boundary was adopted by C. S. Welsh when he filed his bill for partition, as he alleged as the eastern boundary of lot B the line agreed between X and the plaintiffs. A decree was accordingly entered, and a general warranty deed executed by C. S. Welsh to X conveying the eastern half of lot B, using the agreed upon boundary line. Plaintiffs thereupon took possession of the sixty foot strip and X took possession of his adjoining lot. C. S. Welsh later decided that plaintiff had no title to the sixty foot strip, so he executed a quitclaim deed to the defendants, who entered and took possession, ousting the plaintiffs. This is a suit to recover the sixty foot strip. The chancellor dismissed plaintiffs' bill on the ground that the description in their deed did not actually include the sixty foot strip and that the oral agreement fixing the boundary line made by X and the plaintiffs was not binding upon the defendant. Upon appeal the Western Section of the Court of Appeals reversed the chancellor and held for the plaintiffs—thus upholding the oral agreement fixing the boundary line even though the chancellor apparently found that the plaintiffs' deed did not include the sixty foot strip.

As the court points out, it seems to be well settled that adjacent property owners can make an enforceable agreement designating the exact location of their joint boundary lines. The more difficult question is whether or not it must be in writing, or under what circumstances an oral agreement will be enforced.[38] Although there was considerable doubt in the early cases as to the validity of such oral agreements, there are now many cases holding that unascertained and disputed boundary lines of adjoining owners may be permanently established by parol agreement of the parties.[39] This proposition is

38. 8 AM. JUR., *Boundaries* §§ 72-84 (1937); 11 C.J.S., *Boundaries* §§ 63-86 (1938); Annot., 69 A.L.R. 1430 (1930).

39. Chadwell v. Chadwell, 93 Tenn. 201, 23 S.W. 973 (1893); Galbraith v. Lunsford, 87 Tenn. 89, 9 S.W. 365 (1888); King v. Mabry, 71 Tenn. 237 (1879); Davis v. Jones, 40 Tenn. *603 (1859); Lewallen v. Overton, 28 Tenn. *76

closely related to but nevertheless different from two other debatable propositions, namely, (1) that title by adverse possession can be acquired as a result of an oral agreement fixing a boundary line at a mistaken line, and (2) the doctrine of estoppel. One of the requisites necessary to the establishment of a boundary line, other than the true boundary line, by oral agreement in the absence of either adverse possession or estoppel is that there must be a dispute or uncertainty in the location of it between adjoining landowners.[40] There seems to be conflict in the cases in regard to whether it is necessary for the oral agreement to be followed by physical possession and a period of acquiescence.[41] It is clear that the probabilities of upholding the oral agreement are substantially enhanced where it is followed by possession and acquiesence for the period prescribed by the statute of limitations, because the doctrines of adverse possession and estoppel may then be applicable. In the instant case the oral agreement between X, who at best was an equitable owner under his contract with C. S. Welsh, and the plaintiffs, took place in 1942; and the ouster of plaintiffs by defendant, the grantee of C. S. Welsh, was in 1946. The court holds that because C. S. Welsh swore to the original bill in partition which alleged the agreed upon boundary as the true line, the Statute of Frauds was fully satisfied. At another point the opinion concludes that the plaintiffs have proved twenty years of adverse possession of the tract in question, which seems contrary to the facts stated in the opinion.

While the result reached in the instant case may be just, it seems unfortunate that the opinion touches so lightly upon three or four very different and somewhat confiicting theories without developing any one of them satisfactorily. If the Statute of Frauds was satisfied by filing the bill for partition, there is no need to consider the question whether oral agreements fixing boundary lines are enforceable notwithstanding the Statute of Frauds. Likewise, if title to the 60 foot strip was acquired by adverse possession of twenty years, or if the plaintiff wins on the theory that the conduct of C. S. Welsh creates an estoppel, these are very different propositions from the interesting and developing proposition that oral agreements fixing boundary lines are enforceable even though clear evidence of the true boundary line is later established. While practicing lawyers may understandably indulge the technique of including in a brief every possible theory of recovery, even though conflicting, the opinions of appellate courts

(1848); Wilson v. Hudson, 16 Tenn. *398 (1835); Nichol v. Lytle, 12 Tenn. *456 (1833); Houston v. Matthews, 9 Tenn. *116 (1826); Mynatt v. Smart, 48 S.W. 270 (Tenn. Ch. App. 1898).

40. Annot., 69 A.L.R. 1430, 1443 (1930).

41. *Id.* at 1466.

ought to state the basis for the decision with reasoning of refinement and persuasion.

It seems, however, to be fairly well established in Tennessee that an oral agreement fixing a disputed boundary line between adjoining land owners will be upheld even though it is later demonstrated to have been erroneously fixed.[42] This seems to be true quite independently of whether or not the doctrines of adverse possession and estoppel are applicable, and it seems to be another exception to the Statute of Frauds.

Landlord and Tenant

When land is leased to a tenant, the law of property regards the lease as equivalent to a sale of the premises for the term.[43] The lessee acquires an estate in the land, and becomes for the time being the owner and occupier, subject to all of the responsibilities of one in possession, both to those who enter upon the land and to those outside of its boundaries. In the absence of agreement to the contrary, the lessor surrenders possession and control of the land, retaining only a future interest—a reversionary interest, and he has no right even to enter without the consent of the lessee.[44] It followed therefore at common law that as a general rule the landlord was under no obligation to maintain the premises in a state of good repair. Likewise, it followed at common law that the doctrine of *caveat emptor* applied to the *lessee* quite as much as it did to the *vendee* in a sale transaction. Accordingly, it is the great weight of authority outside of Tennessee that the lessor of property does not owe to his prospective lessee the duty of exerting ordinary care at the time of leasing to discover and apprise him of unknown defects which the lessee could equally well find out for himself.[45] To this rule the courts had developed a number of exceptions. The lessor, like the vendor, is under a duty to disclose concealed dangerous conditions of which he has knowledge, "because such conduct amounts to fraud."[46] Likewise, the lessor was held liable to the public generally, other than the tenant and his family or employees, for disrepairs existing at the time of the lease and also for those which were likely to have developed from the use contemplated by the lessee.[47] A third exception, developed at common law, arose when land was leased for a purpose

42. See note 39 *supra.*
43. See generally, Prosser, Torts 465 (2d ed. 1955); Elredge, *Landlord's Tort Liability for Disrepair,* 84 U. Pa. L. Rev. 467 (1936); Harkrider, *Tort Liability of a Landlord,* 26 Mich. L. Rev. 260, 383 (1928).
44. Prosser, Torts 469 (2d ed. 1955).
45. 32 Am. Jur., *Landlord and Tenant* § 672 (1941); Annot., 34 L.R.A. 824 (1896).
46. Willcox v. Hines, 100 Tenn. 538, 546, 46 S.W. 297, 299 (1898); Prosser, Torts 466 (2d ed. 1955).
47. Prosser, Torts 468 (2d ed. 1955).

which involves the admission of the public. The lessor is then under an affirmative duty to exercise reasonable care to inspect and repair the premises before possession is transferred to prevent any unreasonable risk of harm to the public who may enter. While various reasons for this exception have been developed, it is consistent with, and perhaps an extension of the second exception concerning the lessor's duty to the public generally, other than the lessee. It has been applied to theatres, baseball grandstands, hotels, beaches, amusement parks, small stores, shops, restaurants, garages, filling stations, parking lots, doctor's office, boarding house, and piers. On the other hand, this exception is not applied in the case of private dwellings, a warehouse leased for private storage, or a private pier.[48] A fourth exception, concerning which there is authority both ways, is the lease of a furnished house or apartment for a short term, in which case there is said to be an implied contract that the house and its appointments are suitable for occupation in their condition at the time.[49] Under this exception the tenant and his family and guests can recover. A fifth exception, developed at common law, arose in situations involving apartment houses and office buildings in which different parts are leased to different tenants, and the approaches, stairs, passage-ways, and other facilities do not pass to the tenant, but remain under the control of the landlord.[50] To this common law rule and its exceptions should be added that even where the lessor warranted that the premises were in good repair, and covenanted to keep them in proper repair, the majority of the courts have held that when these contracts are broken the only remedy of the tenant is an action for breach of contract which in many cases has been harshly limited to the cost of repairs.[51]

In *Pulaski Housing Authority v. Smith*[52] the Middle Section of the Court of Appeals applied the doctrine of the great *Willcox* decisions[53] of 1896-1898, which imposes upon the lessor an affirmative duty to use reasonable care to inspect the premises before transferring them to the lessee. While this Tennessee doctrine has not been followed by judicial decisions of other states, it is believed to represent a more enlightened view. Modern ideas of social policy have given rise to the rather large number of exceptions to the majority rule considered

48. *Id.* at 468-71.
49. Hacker v. Nitschke, 310 Mass. 754, 39 N.E.2d 644 (1942); 32 AM. JUR., *Landlord and Tenant* § 656 (1941).
50. PROSSER, TORTS 471-73 (2d ed. 1955).
51. Busick v. Home Owners Loan Corp., 91 N.H. 257, 18 A.2d 190 (1941); PROSSER, TORTS 473-76 (2d ed. 1955).
52. 282 S.W.2d 213 (Tenn. App. M.S. 1955).
53. Willcox v. Hines, 100 Tenn. 538, 46 S.W. 297, 41 L.R.A. 824 (1898); Hines v. Willcox, 96 Tenn. 328, 34 S.W. 420, 34 L.R.A. 824 (1896). See 32 AM. JUR., *Landlord and Tenant* § 673 (1941); PROSSER, TORTS 467 (2d ed. 1955) (for what is referred to as the *Tennessee* rule).

above.[54] There is increasing recognition of the fact that the tenant who leases defective premises is likely to be impecunious and unable to make the necessary repairs, and that the financial burden is best placed upon the landlord, who receives a benefit from the transaction in the form of rents. This policy implicit in the Tennessee judicial doctrine has been approved in other states by statutes.[55] While the cost of insurance premiums to shift this risk imposed upon lessors may increase rentals slightly, it is believed to be a socially more desirable rule.

The court in the instant case held the landlord liable for personal injuries sustained as a result of a gas explosion, which occurred within a few hours after the plaintiffs had moved into an apartment in a newly constructed apartment building. A screw cap designed to close the end of the gas line had been left off, so that gas filled the pantry and kitchen. While this rule does not put the landlord under absolute liability for the safety of the premises, it certainly does place on him the duty to use reasonable care and diligence to inspect the premises to see that they are turned over to the tenant in reasonably safe condition, and this is a long step forward. While the court in the instant case, as in the *Willcox* cases, attempts to draw a distinction between "the law of landlord and tenant" and "the law of negligence," such a distinction seems to be unrealistic and without merit. The lessor will never be held liable in this situation except for the breach of a legal duty. The effect of the majority decisions has been to hold that there is no legal duty. The Tennessee doctrine is that the lessor does owe a legal duty to use reasonable care and diligence to see that the premises are turned over to the tenant in reasonably safe condition. The Tennessee law "of landlord and tenant" and "law of negligence" with respect to this particular duty are therefore one and the same.

While the doctrine of the Willcox cases refusing to apply the harsh *caveat emptor* principle—let the buyer beware—to the landlord-tenant situation seems to be a bright, uncommonly enlightened, policy decision of important twentieth-century social significance, may we not hope for the same enlightened decision with respect to the sale of new houses? Since a lease is the sale and transfer of a lesser non-freehold estate in land, should a different rule be applied to the duty of the transferor where an estate in fee simple is transferred? Owners of non-freehold estates were serfs in feudal days, while the favored of the law were those freemen whose economic, political, and social positions in the feudal community were determined by the ownership of a fee simple estate in land. Does it make sense in twentieth-century

54. PROSSER, TORTS 466 (2d ed. 1955).

55. See Fenerstein and Shestack, *The Statutory Duty to Repair*, 45 Ill. L. REV. 205 (1951).

Tennessee to provide the enlightened doctrine of the *Willcox* cases to the modern successors of the feudal serfs, and continue to apply the harsh feudal principle of *caveat emptor* to those modern freemen whose industry has enabled them to become home owners? Nevertheless, it is the case law of Tennessee today that the harsh principle of *caveat emptor* is applicable in the real estate sale type of transaction, even though it is applicable to neither the personal property sale transaction nor the landlord tenant situation.[56] The writer has previously urged that the *caveat emptor* principle should not be applied to the sale of brand new dwelling houses where the land developer-builder combines into one package the subdivision of land, the installation of roads, sewers, water, gas and electrical facilities, the architecture and design of the dwellings, the selection of the quality and character of the building materials and equipment, the employment of labor and the construction of the finished house equipped with refrigerator, kitchen stove, water heater and other appliances.[57] This assembly line process seems so similar to *McPherson v. Buick Motor Co.*[58] as to make paradoxial the application of a different principle. This was recommended only with respect to the sale of *new housing* in situations parallel to the application of the Uniform Sales Act.[59]

EMINENT DOMAIN

There were four cases involving problems concerning the law of eminent domain. In *Stroud v. State*[60] the State of Tennessee and Sevier County joined as plaintiffs in an eminent domain action to acquire 7.2 acres of land to be used in the construction of a scenic highway through the Foothills Parkway of the Great Smoky Mountains National Park. The petition stated that it was deemed necessary to acquire a fee simple title to the land taken. In addition to the proper value of the land sought to be condemned, the defendant owners contended that the plaintiffs had no authority to acquire a fee simple title.

The legislature has the plenary power to grant or to withhold the right to exercise the power of eminent domain, and to define the quantum of interest and estate which may be acquired, whether an easement or the fee or some intermediate between these two, such as a fee simple determinable or a fee simple subject to a right of entry

56. Evans v. Young, 196 Tenn. 118, 264 S.W.2d 577 (1954); Smith v. Tucker, 151 Tenn. 347, 270 S.W. 66 (1925); Dozier v. Hawthorne Development Co., 37 Tenn. App. 279, 262 S.W.2d 705 (M.S. 1953). See Trautman and Kirby, *Real Property—1954 Tennessee Survey*, 7 VAND. L. REV. 921-29 (1954).

57. Trautman and Kirby, *supra* note 56, at 929.

58. 217 N.Y. 382, 111 N.E. 1050 (1916).

59. UNIFORM SALES ACT § 15 (1); TENN. CODE ANN. § 47-1215 (1956).

60. 38 Tenn. App. 654, 279 S.W.2d 82 (E.S. 1955).

for condition broken.[61] The interest to be taken depends upon the construction of the statute. When the statute authorizes or directs the taking of a fee simple title by eminent domain, whether or not such a grant of authority is good public policy is apparently a legislative determination which will not be questioned by the courts.[62] Courts are inclined, however, to construe the statute strictly so as to leave the fee simple title in the landowner. Accordingly, in the absence of any definition of the title to be acquired by the holder of the power of eminent domain, the usual rule of statutory construction is that no greater interest can be acquired than the public use requires. It is said therefore to be universally recognized that when an easement will satisfy the purpose of the grant, the power to condemn the fee will not be included in the grant unless it is so expressly provided.[63]

In the *Stroud* case the Eastern Section of the Court of Appeals reviewed the statutes of the United States and the State of Tennessee providing for the creation of the Foothills Parkway in the Great Smoky Mountains National Park. While the statutes with respect to the *Park* seem to expressly provide for the acquisition of a fee simple title, the statutes concerning the *Parkway* do not seem to expressly so provide. The latter statutes seem to contemplate such right-of-way interests as "shall be satisfactory to the Secretary of the Interior," "appropriate . . . rights-of-way," "to authorize compliance by the State with requirements of any applicable Statute enacted by the Congress of the United States, whether now in force or hereafter enacted." Since the statutes on the *Park* expressly provide for the acquisition of a fee simple title, the court seems to conclude that the State statutes authorize the Department of Highways and Public Works to decide to take a fee simple title for rights-of-way for the *Parkway*. With the statute so construed, the result reached follows accordingly.

It is said that in Tennessee we have three situations in which rights-of-way may be acquired for highway purposes:

1. Where property is taken by one having the power of eminent domain by a condemnation proceeding authorized by statute. Tennessee Code sections 23-1401 to 23-1422 define the rights and remedies in these situations.[64]

2. Where the property is taken by such public authorities without a condemnation proceeding, in which case the statute authorizes

61. 18 AM. JUR., *Eminent Domain* § 114 (1938); Annot., 78 A.L.R. 516 (1932).
62. United States Pipe Line Co. v. Delaware, L. & W. R.R., 62 N.J.L. 254, 41 Atl. 759 (1898); See Annot., 22 L.R.A. (n.s.) 76 (1909).
63. 18 AM. JUR., *Eminent Domain* § 115 (1938); see Annots., 68 A.L.R. 837 (1930); 79 A.L.R. 516 (1932).
64. TENN. CODE ANN. §§ 23-1401 to -1422 (1956).

the property owner to sue for damages within one year after the taking. Tennessee Code sections 23-1423 and 23-1424 describe this procedure.[65]

3. Where the property owner voluntarily conveys the right-of-way to the public authority. Generally this is the result of an agreed settlement.[66]

Suppose that after either of the above three methods of settlement, an unanticipated damage or loss results to the property owner, what result? In the first class of cases, it is a generally accepted rule that if the landowner suffers damages as a result of the condemnation and use of his land which neither he nor the condemnor contemplated, and the damage is such that the court would have rejected the attempt to prove it on the ground that it was speculative and conjectural, the landowner may be compensated for such damage in a subsequent action.[67] In the second class of cases above where the property is taken without a condemnation suit and the landowner is given one year after the taking to sue for damages, unanticipated damages, if any, will probably have occurred by the time of trial, so that they can be compensated as a part of the damages. It is not clear that subsequent unanticipated damages may be recovered thereafter.[68] In the third class of cases where the property owner settles with the public authorities and executes a right-of-way deed, the Supreme Court in the recent case of *Denny v. Wilson County*[69] decided that whether or not unanticipated damages, which later occurred, are compensable will depend "upon the language and effect of the deed conveying the right-of-way in question." In this case the deed provided that the consideration paid by the county was in full satisfaction and com-

65. The Tennessee statutory plan seems to contemplate that the public authority will not take possession of the land until damages are assessed by a jury of inquest in a condemnation suit brought by the public authority as in the first class of cases above. Indeed, section 23-1422 seems to prohibit it. Section 23-1423, however, provides a remedy if the public authority does in fact take possession, whether by mistake or otherwise, without initiating the legal proceeding described in sections 23-1401 to 23-1422. It has been held that section 23-1423 does not authorize or recognize a legal right to take possession prior to the legal appropriation procedure described in sections 23-1401 to 23-1422. See Atlanta, K. & N. Ry. v. Southern Ry., 131 Fed. 657 (6th Cir. 1904); Campbell v. Lewisburg & N.R.R., 160 Tenn. 477, 26 S.W.2d 141 (1930); Armstrong v. Illinois Cent. R.R., 153 Tenn. 283, 282 S.W. 382 (1926). It would seem therefore that section 23-1423 was intended to apply to cases where possession had been taken under a mistake of fact or law concerning the ownership and title of an interest in the land. Section 23-1424 providing a one-year period of limitations against the owner seems to be limited to "such cases."

66. Denney v. Wilson County, 281 S.W.2d 671, 672 (Tenn. 1955).

67. Jones v. Orman, 28 Tenn. App. 1, 184 S.W.2d 568 (M.S. 1944); Fuller v. Chattanooga, 22 Tenn. App. 110, 118 S.W.2d 886 (E.S. 1938); 18 AM. JUR., *Eminent Domain* § 369 (1938). See Trautman, *Real Property—1953 Tennessee Survey*, 6 VAND. L. REV. 1080, 1091 (1953).

68. See Denny v. Wilson County, 281 S.W.2d 671, 673 (Tenn. 1955) and cases there cited.

69. 281 S.W.2d 671 (Tenn. 1955).

pensation for "all damages which they might suffer," and the Supreme Court held that the doctrine of estoppel by deed would be applied to prevent the recovery of unanticipated subsequent damages accruing to the landowners. It was alleged that the public authorities represented to the landowners that the maximum limit of elevation of the grade would be 1.6 feet, and that instead the grade was approximately 6 feet in height, and that this change greatly damaged the market value of their property. In reaching this decision the Supreme Court dealt with two cases[70] decided by the Eastern Section of the Court of Appeals in 1952, commented upon by the writer in the 1953 Tennessee Survey article,[71] which allowed subsequent recovery for unanticipated damages even where the deed in each instance recited that the consideration paid was for "all damages which may be done" to the remainder. In these cases the same rule was applied as in cases of the first situation above where the public authorities bring an action for condemnation holding that the parties are not prevented from recovering for loss which neither party had reason to anticipate, and the possibility of which, if suggested, would have been rejected as speculative and conjectural. The court of appeals said in those cases that "It seems to us too great a burden to force a landowner to obtain expert advise as to possible slides before entering into a compromise agreement with a governmental agency."[72] The Supreme Court in the instant case of *Denny v. Wilson County,* however, seems to criticize those cases for overlooking the doctrine of estoppel by deed, saying that "Where an applicable rule, statute or common law, is overlooked in the decision of a case, such decision is no authority against the rule or for the proposition that the rule is not to be applied in a like case in the future."[73] While the Supreme Court also suggests that the deeds in those cases did not recite that the consideration paid was in full for *all damages* that may be sustained, the words "all damages which may be done" used in the deeds in those cases would seem to be as broad as the words "all damages which they might suffer" used in the instant case.

While public policy would seem to favor the finality of payment decreed by the Supreme Court in the instant case and the protection of the public purse afforded thereby, from the viewpoint of the landowner, extreme care should be taken to have the deed provide for subsequent unanticipated damages which may occur. If this is not agreeable to the public authorities, the landowner will fare better

70. Morgan County v. Neff, 36 Tenn. App. 407, 256 S.W.2d 61 (E.S. 1952); Carter County v. Street, 36 Tenn. App. 166, 252 S.W.2d 803 (E.S. 1952).

71. Trautman, *Real Property—1953 Tennessee Survey,* 6 VAND. L. REV. 1080, 1091 (1953).

72. Carter County v. Street, 36 Tenn. App. 166, 252 S.W.2d 803 (E.S. 1952).

73. 281 S.W.2d 671 (Tenn. 1955).

if a condemnation suit is brought. The court of appeals said that a landowner has every right to expect fair treatment from the governmental agency with which he deals, but under the doctrine of estoppel by deed announced by the Supreme Court, the landowner may lose subsequent unanticipated damages because he was so agreeable.

Closely related to the problem of subsequent unanticipated injuries and damages to the landowner discussed above were two cases, *Polk v. Davidson County*[74] and *Davidson County v. Beauchesne*[75] decided by the Middle Section of the Court of Appeals involving the widening of the Nolensville Pike out of Nashville. These cases are the aftermath of a case decided by the Supreme Court of Tennessee in 1953 styled *McKinney v. Davidson County.*[76] The comment on that decision in the 1953 Tennessee Survey article[77] was cited by the court of appeals in the instant case.

In 1904 the owner of large acreage bordering the east side of Nolensville Pike conveyed an easement for a street railway line to the Nashville Railway and Light Company over a 30 foot strip of land alongside the Pike, with the provision that if the company ceased to operate the line, the easement would revert to the grantor. In 1905 the owner of the acreage platted it into a subdivision of large lots, describing them by metes and bounds as being bounded, in some instances by the Nolensville Pike, and in some instances by the railway right-of-way. These lots bordering the right-of-way and highway were divided into smaller tracts which are now owned by the various lot owners who are parties in these cases. The railway right-of-way was abandoned in 1942 and the lot owners cleared off the portion of it adjacent to their respective lots and used it in connection therewith, e.g., as a parking area for a highway restaurant.[78] When the county widened Nolensville Pike in 1951, it took 36 to 37 feet. The county was willing to pay for the 6 or 7 feet taken off each lot, but not willing to pay each lot owner for the portion of the railway right-of-way adjacent to his lot. In *McKinney v. Davidson County* the Supreme Court of Tennessee in 1953 reversed the Circuit Court of Davidson County and held that the county was obligated to pay for the 30 feet as well as the 7 feet taken in that case. As pointed out in the 1953 Tennessee Survey article,[79] while it would have been possible for the Supreme Court to have held that under the terms of the 1904 easement deed the abandoned railway right-of-way was owned by the successors in interest to the 1904 grantor, the court applied a well-known rule of

74. 281 S.W.2d 257 (Tenn. App. M.S. 1955).
75. 281 S.W.2d 266 (Tenn. App. M.S. 1955).
76. 194 Tenn. 689, 254 S.W.2d 975 (1953).
77. Trautman, *supra* note 71, at 1089.
78. See McKinney v. Davidson County, 194 Tenn. 689, 254 S.W.2d 975 (1953).
79. See note 77 *supra.*

construction to hold that the grantor's intent in 1905, when he described by metes and bounds the large lots in his subdivision, was to extend the grant of the lots bordering the pike as far as the grantor owned, subject to the easement. This is only a rule of construction, not a rule of law.[80] The instant cases of *Polk v. Davidson County* and *Davidson County v. Beauchesne* are suits by landowners neighboring McKinney on Nolensville Pike to recover for the portion of the 30 foot strip adjacent to their land.

In *Polk v. Davidson County* the county had originally brought a condemnation suit pursuant to the Tennessee statute against Polk and wife on January 4, 1951. The case proceeded to judgment and an award was made of $2,756.25. The Polks acquiesced in that judgment and the sum was paid and accepted. But this sum was not intended or understood to be compensation for the 30 foot right-of-way strip because the county there believed that this 30 foot strip was not owned by the abutting lot owners, rather that it had been dedicated to public use. The court of appeals says that it is clear that the sum paid to Polk and his wife was meant to be compensation only for the 6 foot strip and the incidental damages. Since the actual taking by the county was in June of 1951, and this suit was filed by the Polks as a separately docketed suit on April 2, 1953, after the decision of the Supreme Court in the *McKinney* case in January, 1953, the court of appeals applies the one year statute of limitations provided in section 23-1424 of the Tennessee Code to hold for the county and against the landowner.

The decision to apply the one year statute of limitations in the Polk case seems to be somewhat debatable. By its express terms the statute applies only "in such cases" as are described in section 23-1423. The section 23-1423 cases are unusual cases where the public authority actually violates the law by taking possession of the land without bringing a condemnation proceeding, due to a mistake of fact or law. It has been held in several cases that there is no legal right in a public authority to take possession in advance of a legal appropriation as contemplated by sections 23-1401 to 23-1422, but if possession is in fact taken contrary to the statute without a legal appropriation, then section 23-1423 authorizes the land owner to bring the condemnation suit, and section 23-1424 provides a one year statute of limitation "in such cases." It would seem clear that *Polk v. Davidson County* is not such a case because the county did in fact bring the condemnation action against R. L. Polk and wife on January 4, 1951. Thus the case would seem analogous to the cases on unanticipated injuries and losses which neither party had any reason to anticipate.[81] Since it is the purpose of

80. Trautman, *supra* note 71, at 1089 nn. 52 & 53.
81. 18 AM. JUR., *Eminent Domain* § 369 (1938).

a condemnation proceeding to make a fair and proper award to the landowner for the taking of his land, it would seem that all such cases would be decided as proceedings supplemental to the original action and not as a new and different cause of action filed as a separately docketed case. Since there was a condemnation proceeding filed by the county against the Polks in 1951, a separately docketed action by them against the county under section 23-1423 during that one year period would seem to have been out of order and subject to a plea in abatement. If the one year limitation period of section 23-1424 is applicable only to actions which the Polks could not have brought in 1951, it would seem that this section of the statute ought not to be applied to their 1953 effort to recover for that which the Supreme Court of Tennessee in the *McKinney* case held the landowner entitled to. Also, it does not seem consistent to allow additional damages for unanticipated injuries and losses, which are apparently not subject to a one year limitation, and to apply the limitation period to this type of case.

Davidson County v. Beachesne[82] involves the same facts except that the county acquired the right-of-way by deed dated November 20, 1950. The description in the deed was worded so as to include in the metes and bounds description the 30 foot abandoned right-of-way. The total quantity of land designated in the deed in number of square feet, however, was much smaller than the amount actually included because this 30 by 53 foot strip was not included in the total number of square feet. The plaintiff agrees that her deed includes the strip in question, but she asserts that she was not paid for it, and that she is entitled to compensation on the authority of the *McKinney* case. The court of appeals decided the case for the county on two theories: (1) The estoppel by deed doctrine was used, consistently with the Supreme Court decision in *Denny v. Wilson County*, above, because the 1950 deed provided that the consideration paid was "for all damages which may be done to the remainder." As pointed out above, the application of this doctrine represents somewhat of a departure from previous Tennessee cases which have allowed subsequent recovery for unanticipated injuries; (2) the one year limitation of section 23-1424 was applied against the plaintiff. As pointed out above, that statute would seem to be limited to a fact situation different from that existing here.

While the application of the one year statute of limitation in these cases seems somewhat debatable, it may very well be that the same result would be reached, at least in the *Polk* case, on the theory of res judicata. A final judgment was entered in the condemnation suit

82. 281 S.W.2d 266 (Tenn. App. M.S. 1955).

brought by the county against the Polks. They acquiesced in that judgment and accepted a satisfaction of it in 1951 while their neighbors, the McKinneys, appealed to the Supreme Court and won a reversal in 1953. Thus, it can be said that this situation is not analogous to the case of subsequently occurring unanticipated damages which would have been excluded as speculative and conjectural in the trial of the condemnation suit. While the court of appeals was aware of the possibility of deciding the cases on the theory of res judicata, it chose to base the decisions on what seems to be the somewhat weaker and more debatable grounds of the one year statute of limitations.

MISCELLANEOUS

Mink v. Majors[83] was decided by the Western Section of the Court of Appeals in 1953, certiorari denied in August, 1954, but the opinion was first published during the June 1, 1955 to May 31, 1956, period covered by this survey. It was an action of trespass for damages sustained from widening a ditch on plaintiff's property without his permission. The circuit court instructed the jury that the proper measure of damages was the difference in the market value of the property before and after the alleged damage. The circuit court verdict and judgment was reversed because of the failure to instruct at defendant's request that the measure of damages was the difference in market value of the property before and after the injury, provided the costs of restoring the property was more than the depreciation in market value; but if the reasonable cost of restoring and repairing the property is less than the depreciation in market value, then the costs of restoring it is the lawful measure of damages. There was evidence that the ditch could have been filled back to its former dimensions at a nominal cost of $100.00.

Moore v. Berry[84] involved the sale of real estate at auction. It was held (1) that conditions prescribed by the seller or owner and announced at the time and place of the auction are binding on the purchaser whether or not he knew or heard them, and (2) that where the auction was held on Saturday and the plaintiff's highest bid was rejected by the sellers on the Tuesday following, the time interval was not unreasonable so as to obligate the owners to sell. Both propositions seems to be amply supported by the authorities cited.

83. 279 S.W.2d 714 (Tenn. App. W.S. 1953).
84. 288 S.W.2d 465 (Tenn. App. E.S. 1955).