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# Real Property -- 1955 Tennessee Survey

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# REAL PROPERTY—1955 TENNESSEE SURVEY

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## DEEDS AND TITLES

*Construction of Deed: Limitation to "My own living children":* The deed presented for construction in *Tipton v. Wynn*, after conveying a life estate to the grantor's daughter, contained the following language:

> "and after her death to the heirs of her body. In case she has no bodily heirs, then to my own living children."[1]

When he executed the deed, the grantor had six living children, including the life tenant-grantee. Only one of the grantor's children, however, survived the life tenant, who died without bodily heirs. The complainants, certain heirs of those children of the grantor who had predeceased the life tenant, maintained that the term "living children" referred to those children of the grantor living at the date of the deed. Thus complainants sought to share in the division of the property on the theory that they had inherited the interests of the deceased children. The court, considering the grantor's intent to be the determinative issue, found that the grantor had intended the death of the life tenant to be the crucial date and affirmed the chancellor's decree in favor of the defendant, the sole surviving child of the grantor.

Comment upon the decision is rendered difficult because of the abbreviated statement of the facts upon which the opinion is based. Whether the use of the particular language of the deed results, as a matter of law, in a finding that the takers of the interest are to be determined as of the death of the life tenant, or whether the record disclosed parol evidence of such intent to clarify the ambiguity in the deed, is not apparent from the reported decision.

Nor is it possible from the statement of facts to determine whether Code Section 7598[2] has any possible bearing on the case. That section, dealing with conveyances to a class, would clearly be applicable if any of the complainants was a child of a deceased member of the class composed of the grantor's "living children."[3] The relevant part of the section is as follows:

> "Where a . . . conveyance . . . is made to a class of persons subject to fluctuation by increase or diminution of its number in consequence of future births or deaths, and the time of . . . vestiture or enjoyment is fixed . . . on the happening of a future event, and any member of such

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1. 268 S.W.2d 329 (Tenn. 1954).
2. TENN. CODE ANN. § 7598 (Williams 1934).
3. 5 AMERICAN LAW OF PROPERTY § 21.11 (Casner ed. 1952); Chambers, *History of the Class Doctrine in Tennessee*, 12 TENN. L. REV. 115, 120-21 (1934).

> class shall die before . . . the happening of such event, and shall have issue surviving when . . . such event happens, such issue shall take the share of the property which the member so dying would take if living, unless a clear intention to the contrary is manifested by the . . . deed. . . ."[4]

It would seem that if one or more of the complainants was a child of a deceased child of the grantor, the decision is a holding that either the language "living children," or the parol evidence clarifying it, manifested a clear intention to cut off the lineal descendants of those members of the class who predeceased the life tenant.[5]

If, on the other hand, Section 7598 was inapplicable due to the fact that none of the complainants was a child of a member of the class, then the case would seem to require a determination of the applicability of the "class doctrine" announced in the leading case of *Satterfield v. Mayes*.[6] Under that rule of construction, when a gift is made to a class, members of the class who die prior to the event upon which vestiture is contingent "are not actual objects of the gift."[7] The "entire interest vests" in those members surviving at the date of vestiture. But this doctrine does not apply where the gift can be construed as one to individuals rather than to a class.[8] Indeed, in *Denison v. Jowers*[9] the court emphasized that because of the harshness of the class doctrine every opportunity would be seized so to construe ambiguous language. Thus, the decision may stand for the proposition that the language of the deed would not admit of the construction of individual gifts.

Assuming that the complainants are not the issue of the deceased members of the class, the decision is in substantial accord with the *Denison* case. There, as here, the instrument in question failed to list the individual members of the class, which was composed of brothers and sisters of the testator. In neither instrument was language indicating individual gifts to be found.

The yoke of the class doctrine has not always been worn by the Tennessee Court without chafing.[10] It has occasioned criticism by legal writers[11] and apparently prompted the ameloriative legislation in Section 7598.[12] Certainly the rule, that the mere fact of a future limita-

4. TENN. CODE ANN. § 7598 (Williams 1934).
5. Chambers, *supra* note 3, at 120-21.
6. 30 Tenn. 57, 59 (1849); see also Denison v. Jowers, 192 Tenn. 356, 241 S.W.2d 427 (1951); Jennings v. Jennings, 165 Tenn. 295, 54 S.W.2d 961 (1932); Tate v. Tate, 126 Tenn. 169, 148 S.W. 1042 (1912); Sanders v. Byrom, 112 Tenn. 472, 79 S.W. 1028 (1904).
7. Satterfield v. Mayes, 30 Tenn. 57, 60 (1849).
8. *Ibid.* See Denison v. Jowers, 192 Tenn. 356, 359, 241 S.W.2d 427, 428 (1951); Hobson v. Hobson, 184 Tenn. 484, 491, 201 S.W.2d 659, 662 (1947).
9. Denison v. Jowers, *supra* note 8, at 359, 241 S.W.2d at 428.
10. *Id.* at 359, 241 S.W.2d at 428; Harris v. France, 33 Tenn. App. 333, 345, 232 S.W.2d 64, 69 (W.S. 1950).
11. 5 AMERICAN LAW OF PROPERTY § 21.11 (Casner ed. 1952); Chambers, *History of the Class Doctrine in Tennessee*, 12 TENN. L. REV. 115, 118-21 (1934).
12. Harris v. France, *supra* note 10; Chambers, *supra* note 11, at 120.

tion to a class makes survival a condition precedent to vestiture, states a minority view.[13]

On the other hand, when by the terms of the dispositive instrument the class which is to take is described as "living children," Tennessee joins what is probably the majority of jurisdictions in holding that by such language the transferor intended that the takers be only those who survive until the date of distribution.[14]

*Construction of Deed: Resolution of Internal Inconsistencies: Higginson v. Smith*[15] arose upon the following set of facts. While they were husband and wife, defendant and complainant acquired certain real property. The deed contained internal inconsistencies in that the granting clause purported to vest the entire fee in *H*, while the habendum and covenanting clauses indicated that *H* and *W* were to hold as tenants by the entirety. *H* and *W* were subsequently divorced and *W* sought to have the property partitioned on the ground that, by virtue of the divorce, she and *H* now held the land as tenants in common. *H* resisted partition on the theory that *W* had acquired no interest in the property under the deed. In holding for *H* the court indicated that some vitality remains in the rule of construction that where the language of the granting clause contradicts the habendum or covenanting clauses, the granting clause prevails. Certain dicta in *Quarles v. Arthur*[16] had interpreted language in *McCord v. Ransom*[17] as indicating that even where the intention of the parties could not be found from the instrument as a whole, no preference was to be given any part by reason of its position.[18] In the instant case the court emphasized that technical rules of construction regarding the significance to be attached to the various formal parts of deeds no longer obtain where the intention of the parties is apparent from an examination of the instrument as a whole.[19] Where, as here, however, no such intention appears, the technical rules are applicable and the language of the granting clause prevails over conflicting language in the subsequent portions of the deed. The decision is in accord with prior Ten-

13. 33 AM. JUR., *Life Estates, Remainders, and Reversions* §132 (1941); 5 AMERICAN LAW OF PROPERTY § 21.11 (Casner ed. 1952); 3 RESTATEMENT, PROPERTY § 296 (1940); Note, 166 A.L.R. 823 (1947).

14. 5 AMERICAN LAW OF PROPERTY § 21.15 (Casner ed. 1952); 3 RESTATEMENT, PROPERTY § 251 (1940); Note, 114 A.L.R. 4, 54-100 (1938).

15. 272 S.W.2d 348 (Tenn. App. M.S. 1954).

16. 33 Tenn. App. 291, 231 S.W.2d 589 (E.S. 1950).

17. 185 Tenn. 677, 207 S.W.2d 581 (1948).

18. "[L]ater cases . . . [*e.g., McCord* case] . . . seem to hold that no preference is to be given any part over another by reason of its position." Quarles v. Arthur, 33 Tenn. App. 291, 296, 231 S.W.2d 589, 591 (E.S. 1950).

19. Thompson v. Turner, 186 Tenn. 241, 209 S.W.2d 25 (1948); McCord v. Ransom, 185 Tenn. 677, 207 S.W.2d 581 (1948); Simpson v. Simpson, 160 Tenn. 645, 28 S.W.2d 349 (1930); Quarles v. Arthur, 33 Tenn. App. 291, 231 S.W.2d 589 (E.S. 1950). Compare the following cases stating the rule but finding no intention: Ballard v. Farley, 143 Tenn. 161, 226 S.W. 544 (1920); Teague v. Sowder, 121 Tenn. 132, 114 S.W. 484 (1908).

nessee cases.[20] The rule announced is but an application of a universally followed general principle that where a controlling intention cannot be found from a reading of the entire instrument, inconsistencies between various parts of a deed will be resolved by adverting to the intention first expressed in the instrument.[21]

*Boundaries: Private Road; Presumption of Grant to Center:* It is a well-established rule of construction in Tennessee that a deed describing property as bounded by a public road conveys the grantor's interest to the center of the road if he owns so far and expresses no contrary intention.[22] *Walker v. Tanner*[23] raised the question whether the rule was applicable where the boundary is a private road. Walker, after constructing a private road approximately through the center of his property, conveyed the north half of the tract to Tanner and described the grant as "being bounded by . . . [the] private roadway." Walker sought to establish that this common boundary was the north side of the road and sought to enjoin an alleged obstruction of the road by Tanner. Tanner claimed title to the center of the road subject to a right in both parties to use the road. The court, recognizing that there is a split of authority on the question,[24] adopted the majority view that the presumption of a grant to the center applies equally to public and private roads.[25]

Apparently the only prior Tennessee case involving a private right of way as a boundary is *Vanderbilt University v. Williams.*[26] In that case the fact that the grantor expressly granted an easement was held to negative the possibility that he meant to convey the fee up to the center line. The court, therefore, was not called upon to decide whether a presumption of a grant to the center arises from a conveyance of land bounded by a private road.

A clear expression of intention will, of course, control,[27] but, absent

20. Ballard v. Farley, *supra* note 19; Teague v. Sowder, *supra* note 19.
21. 26 C.J.S., *Deeds* §§ 90, 128-31 (1941).
22. Nashville v. Lawrence, 153 Tenn. 606, 284 S.W. 882, 47 A.L.R. 1266 (1926); Reeves v. Allen, 101 Tenn. 412, 47 S.W. 495 (1898); Hamilton County v. Rape, 101 Tenn. 222, 47 S.W. 416 (1898); Sawtelle v. Astor, 23 Tenn. App. 33, 126 S.W.2d 367 (W.S. 1938); Trautman, *Real Property,* 6 VAND. L. REV. 1080, 1089 (1953). *Cf.* Vanderbilt University v. Williams, 152 Tenn. 664, 280 S.W. 689 (1926); Iron Mountain R.R. v. Bingham, 87 Tenn. 522, 11 S.W. 705, 4 L.R.A. 622 (1889).
23. 275 S.W.2d 958 (Tenn. App. M.S. 1954).
24. 8 AM. JUR., *Boundaries* § 48 (1937); 11 C.J.S., *Boundaries* § 43 (1938).
25. Jacob v. Woolfolk, 90 Ky. 426, 14 S.W. 415, 9 L.R.A. 551 (1890); Davian v. Betourney, 325 Mass. 1, 88 N.E.2d 541 (1949); 6 THOMPSON, REAL PROPERTY §§ 3396-97 (perm. ed. 1940); 8 AM. JUR., *Boundaries* § 48 (1937); 11 C.J.S., *Boundaries* § 43 (1938).
26. 152 Tenn. 664, 280 S.W. 689 (1926).
27. Iron Mountain R.R. v. Bingham, 87 Tenn. 522, 11 S.W. 705, 4 L.R.A. 622 (1889); 6 THOMPSON, REAL PROPERTY § 3402 (perm. ed. 1940); 8 AM. JUR., *Boundaries* § 37 (1937). As to the explicitness required to overcome the presumption, see Nashville v. Lawrence, 153 Tenn. 606, 284 S.W. 882 (1926). ("along the west side of said new street" was held insufficient to overcome presumption that grantor intended the center of the street).

such intention, resort must be had to rules of construction and presumption. One of the chief reasons underlying the rule as applied to public roads is that the retention of the fee in the entire road would be of little practical value to a grantor.[28] This reason, of course, has less validity in the case of a private road. Accordingly, some jurisdictions refuse to extend the principle to deeds calling for private roads as boundaries.[29]

By the weight of authority, however, the rule is applicable to grants bounded by private roads.[30] The rule, as has been suggested, is one of construction designed to effect the intent of the parties where such intent has been imperfectly expressed. Like most rules of construction, it undoubtedly is frequently used to supply the intent that the parties would have had if they had contemplated the particular problem. To the extent that this is true, rules of construction should be founded upon common experience. Another reason for the rule as to public highways has been expressed as "the general understanding of the people, and the extensive and immemorial practice of claiming and acquiescing in such rights."[31] It is probable that the intent of the parties, if indeed such intent is formulated at all, is not different in the case of a private road from that in the case of a public road. But if in a given case a contrary intention exists, it is not too much to require that such intent be clearly expressed, particularly inasmuch as most jurisdictions presume, on the basis of common experience, a similar intent in both situations.

*Building Restrictions—Enforceability by Grantees Inter Se:* In *Owenby v. Boring*[32] the court had to decide whether building restrictions contained in all the original deeds to a subdivided tract were mutually enforceable by the grantees. A narrower question raised by the facts, but not discussed by the court, was whether one who purchases a lot in a subdivision can enforce such restrictions against the assignee of one who subsequently purchases a similarly restricted lot.[33] Nine of the ten lots in a subdivision had been sold under deeds binding the grantees and their successors in interest to use the property for residential purposes only.[34] The language of the deeds, how-

28. Nashville v. Lawrence, 153 Tenn. 606, 611, 284 S.W. 882, 883 (1926) (quoting 9 C.J., *Boundaries* § 84 [1916]); 6 THOMPSON, REAL PROPERTY 606 (perm. ed. 1940).

29. Seery v. City of Waterbury, 82 Conn. 567, 74 Atl. 908, 25 L.R.A. (N.S.) 681 (1909).

30. See authorities cited note 25 *supra.*

31. Paul v. Carver, 26 Pa. 223, 225 (1856).

32. 276 S.W.2d 757 (Tenn. App. E.S. 1954).

33. See generally regarding this problem: Doerr v. Cobbs, 146 Mo. App. 342, 123 S.W. 547 (1909); Mulligan v. Jordan, 50 N.J. Eq. 363, 24 Atl. 543 (Ch. 1892); 2 AMERICAN LAW OF PROPERTY § 9.30 (Casner ed. 1952); 5 RESTATEMENT, PROPERTY § 541, comment *f* (1944); 3 TIFFANY, REAL PROPERTY § 867 (3d ed. 1939); Reno, *The Enforcement of Equitable Servitudes in Land: Part II,* 28 VA. L. REV. 1067 (1942).

34. Though minor variations in wording appeared in the several deeds, the

ever, failed to express whether the restrictions were to inure to the benefit of the grantor alone or were to be enforceable by the other grantees as well. The complainant purchased the first lot sold in the subdivision and the defendant claimed through a subsequent purchaser of an adjoining lot. None of the deeds contained language obligating the grantor similarly to restrict the lots remaining to be sold. Nor were the restrictions incorporated into the plat of the subdivision filed in the Register's Office. Either of these methods would adequately have evidenced the intention of the original parties to burden all the lots with restrictions enforceable by any other grantee.[35] The court, treating such intent as the determinative issue in the case, held that an intention to impose mutually enforceable restrictions could be inferred from the fact of similar restrictions in all the deeds. *Ridley v. Haiman*[36] was relied upon as authority that such systematic inclusion evidenced a general development plan which, in turn, indicated that the building restrictions should be reciprocally enforceable by the respective grantees.

The result is in line with numerous other jurisdictions where the common-law policy against restrictions on the free use and enjoyment of land has given place to the modern notion that restrictions tending to protect the residential character of subdivisions should be liberally enforced.[37] This near uniformity of result has been achieved, however, through the application, frequently within a single jurisdiction, of divergent theories. Thus, building restrictions have been called mere personal contract rights, covenants running with the land, easements, equitable servitudes, reciprocal negative easements, equitable restrictions, and, as in the instant case, restrictive covenants.[38]

The cases are legion in which building restrictions failing to meet the formal requirements of covenants running with the land have nevertheless been enforced.[39] Absence of the requisite privity of estate, for instance, does not preclude enforcement by a lessee of the benefited

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court concluded that the restrictions in all the deeds were designed to secure an exclusively residential subdivision. Thus the defendant's large neon sign advertising his drive-in theater, though on a vacant lot, was held to be a violation of the restriction.

35. BURBY, REAL PROPERTY § 97 (2d ed. 1954).

36. 164 Tenn. 239, 47 S.W.2d 750 (1932).

37. Jackson v. Richards, 26 Del. Ch. 260, 27 A.2d 857 (Ch. 1942); Zelinski v. Becker, 318 Mich. 209, 27 N.W.2d 615 (1947); Higdon v. Jaffa, 231 N.C. 242, 56 S.E.2d 661 (1949); 3 TIFFANY, REAL PROPERTY 506 (3d ed. 1939). *But cf.* Bright v. Forest Hill Park Development Co., 133 N.J. Eq. 170, 31 A.2d 190 (Ch. 1943).

38. For a critical discussion of the loose use of terminology in this field, see Note, 14 VA. L. REV. 646 (1928). Regarding the legal consequences which flow from characterizing these rights as covenants running with the land or equitable servitudes, see Reno, *The Enforcement of Equitable Servitudes in Land: Part I*, 28 VA. L. REV. 951, 961-79 (1942).

39. 14 AM. JUR., *Covenants, Conditions and Restrictions* § 326 (1938); 2 AMERICAN LAW OF PROPERTY § 9.24 (Casner ed. 1952).

land against a lessee of the burdened land.[40] The fact that enforcement is commonly had in such situations demonstrates that the theory upon which building restrictions are enforced is not a mere extension of the concept of covenants running with the land.

Most of the cases involving the enforcement of building restrictions can be explained on one or another of two theories.[41] It has been suggested that the rights acquired under deeds containing such restrictions are essentially contractual.[42] The grantor has a contract right against the grantee that the restrictions shall be observed. In aid of this contract right equity imposes upon society as a whole the duty to refrain from knowingly interfering with the performance of this contract. It is the breach of this implied duty which is enjoined in order that the basic contract may be specifically performed. Under this theory, both the contract right and the right against strangers are impliedly assigned to subsequent purchasers of the benefited land.

Another widely accepted theory is that the rights acquired are not merely rights in and arising out of contract, but property rights—equitable interests in the land of another frequently referred to as equitable servitudes.[43] Under this theory the burden and the benefit attach to the respective parcels of land as in the case of easements, the interest in the servient land passes with ownership of the dominant estate, and the obligation attached to the servient estate passes to all subsequent possessors with notice of the restrictions.

It will be noted that neither theory supports the notion that a prior purchaser *X* can enforce, as in the instant case, building restrictions contained in a later deed from the common grantor to a subsequent grantee *Y*. Under the *contract* theory, the grantor, at the time of the sale to *X*, has no rights against *Y* which could be held to be impliedly assigned to *X*. Likewise, under the *property* theory *X*'s land was not, at the time he purchased it, benefited by restrictions imposed upon servient land.

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40. Magnolia Petroleum Co. v. Suits, 40 F.2d 161 (10th Cir. 1930). *Cf.* Sedrose, Inc. v. Mazmanian, 326 Mass. 578, 95 N.E.2d 677 (1950).

41. See Jackson v. Richards, 26 Del. Ch. 260, 27 A.2d 857, 860 (Ch. 1942); Bristol v. Woodward, 251 N.Y. 275, 167 N.E. 441, 445-46 (1929). For a thorough analysis and discussion of these two theories, see Reno, *The Enforcement of Equitable Servitudes in Land: Part I*, 28 VA. L. REV. 951, 973-79 (1942); Reno, *The Enforcement of Equitable Servitudes in Land: Part II*, 28 VA. L. REV. 1067 (1942). *Compare* CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 171-77 (2d ed. 1947) (supporting incorporeal interest theory), *with* 3 TIFFANY, REAL PROPERTY § 861 (3d ed. 1939) (approving the contract theory).

42. DeGray v. Monmouth Beach Clubhouse Co., 50 N.J. Eq. 329, 24 Atl. 388 (Ch. 1892). See discussion in 3 TIFFANY, REAL PROPERTY § 861 (3d ed. 1939); Ames, *Specific Performance For and Against Strangers to the Contract*, 17 HARV. L. REV. 174 (1904); Stone, *The Equitable Rights and Liabilities of Strangers to a Contract*, 18 COL. L. REV. 291 (1918).

43. Werner v. Graham, 181 Cal. 174, 183 Pac. 945 (1919). *Cf.* Goldberg v. Nicola, 319 Pa. 183, 178 Atl. 809 (1935). See CLARK, COVENANTS AND INTERESTS RUNNING WITH LAND 174-77 (2d ed. 1947).

The courts have generally refused to enforce restrictions at the suit of a prior grantee where he was unable to show that he purchased in reliance upon a general plan evidencing his grantor's intention that surrounding lots would be similarly restricted for the mutual benefit of all the various grantees.[44] Given such reliance, however, several theories have been advanced upon which X can prevail.[45] The most widely-accepted, perhaps, is that when X purchases in expectation of the benefit of similar restrictions subsequently to be imposed upon surrounding lots, an implied reciprocal servitude is imposed upon the remaining land of the common grantor.[46] Thus, when Y purchases his lot, it is already burdened with a servitude benefiting X's land.

Regardless of which theory is applied, it is apparent that the fact essential to X's enforcement is the communication to, and reliance upon by, him of the grantor's intention to restrict the other lots for the benefit of X.

In the leading Tennessee case of *Ridley v. Haiman,* relied upon by the court in the instant case, a broad rule is announced that:

> "[W]here the owner of a tract of land subdivides it and sells the different lots to separate grantees, and puts in each deed restrictions upon the use of the lot conveyed, in accordance with a general building, improvement or development plan, such restrictions may be enforced by *any grantee against any other grantee.*" (Emphasis supplied.)[47]

In the *Ridley* case, however, it did not appear that the complainant had purchased his lot prior to the defendant. It would seem that in the case of a prior purchaser, the significant fact would be not the fact of a general building plan as evidenced by similar deeds, but the communication of such a plan to the prior grantee and reliance thereupon by him. The court in the instant case observed that the complainant's proof tended to show that the purchasers understood the subdivision to be uniformly restricted. That the subsequent purchasers bought with this understanding, or even that at the time they purchased a uniform plan in fact existed, would not necessarily prove that complainant purchased in reliance upon a then existing plan.

It may be that proof of such reliance was introduced. At any rate, it would have been well for the court to spell out, for the sake of

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44. Toothaker v. Pleasant, 315 Mo. 1239, 288 S.W. 38 (1926); Mulligan v. Jordan, 50 N.J. Eq. 363, 24 Atl. 543 (Ch. 1892); 2 AMERICAN LAW OF PROPERTY 422-24 (Casner ed. 1952).

45. For a discussion and analysis of these theories see Reno, *supra* note 41, at 1082-84. Under one theory, the common grantor is considered a trustee of the benefits acquired as a result of subsequent grants, holding the same for the use of the prior grantee. Under another theory, the prior grantee is treated as a third-party beneficiary of a contract between the common grantor and later grantees. A third theory is discussed in the text.

46. Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925); Lowrance v. Woods, 54 Tex. Civ. App. 233, 118 S.W. 551 (1909); 2 AMERICAN LAW OF PROPERTY 426 (Casner ed. 1952).

47. 164 Tenn. 239, 250, 47 S.W.2d 750, 753 (1932).

clarity of thought in this peculiarly important field of modern property law, the theoretical basis for the enforcement of equitable servitudes by other grantees—particularly, enforcement by a prior grantee. On the other hand it may well be, as one distinguished writer concluded, that "[p]ossibly the best solution is to recognize the rights of prior purchasers as being *sui generis,* and not based upon any established legal theory."[48]

*Notice: Joint Possession by Record Owner and Another:* The most significant question presented in *Johnson City v. Milligan Utility District*[49] was whether joint possession of realty by the record owner and another was sufficient to put a purchaser on notice of the claims of the possessor not of record. The question was one of first impression in Tennessee.

Johnson City claimed that the Utility District had purchased a water line apprised of the city's alleged right to use, supervise and control the line. That the city had in fact been supplying and regulating the flow of water through the line was one of the factors relied on by the city as conveying notice of its claim to the district.[50]

The city's right, so it claimed, derived from the terms of a resolution passed in 1927 whereby the city agreed to furnish water for the line if the district's remote predecessor in interest would construct and maintain the line. Over a period of twenty-odd years the city had regulated the flow of water through the line.[51] Pursuant to the agreement, the party who built the line and his assigns made repairs on the line from time to time and were paid connection fees collected by the city when new customers were added.

The court adopted the view that the city's possession when considered with the fact that the title holder of record had consistently collected the "tap fees," was insufficient to put a prospective purchaser on notice that the city claimed in derogation of the record title. This view is amply supported by the authorities and is founded on the theory that constructive notice arises only from a set of facts inconsistent with a perfect right in the party proposing to sell.[52] When one is in joint occupancy with the record title holder, a prospective purchaser may properly presume that possession by the occupant not of record

48. Reno, *The Enforcement of Equitable Servitudes in Land: Part II,* 28 VA. L. REV. 1067, 1084 (1942).

49. 276 S.W.2d 748 (Tenn. App. E.S. 1954).

50. The city also relied upon certain language appearing in deeds in the district's chain of title as effective to put the district on notice. This aspect of the case will not be discussed other than to note that the court found the language relied upon to be of doubtful meaning and, therefore, resolved the ambiguity in favor of the otherwise innocent purchaser.

51. The city also claimed title by twenty years' adverse possession. This claim was dismissed for the reason that the city's possession had been permissive and not exclusive.

52. Townsend v. Little, 109 U.S. 504 (1883); 55 AM. JUR., *Vendor and Purchaser* § 717 (1946); Note, 2 A.L.R.2d 857 (1948).

is merely permissive.[53] In the instant case, the court noted that the water line, being underground, was not susceptible of physical possession by the record title holder. The right to receive the connection fees, however, a fact undoubtedly communicated to the district by its vendor, was the substantial equivalent of possession. The court, therefore, held that the district, at the time it purchased, could properly presume that the city's use of the line was consistent with the record title in the district's grantor.

*Tax Titles—Prerequisites to Suits to Invalidate: Lee v. Harrison*[54] involved the applicability of Sections 1611 and 9159.1 to a suit to remove clouds on title based on the theory that the tax title under which the defendant claimed was void because of irregularities in the proceeding by which it was obtained.

Section 1611 requires one seeking to invalidate a tax title to tender the amount of the bid and all subsequently accrued taxes as a condition precedent to bringing suit.[55] Section 9159.1 in substance prohibits suits to recover real estate by persons who have paid no taxes thereon for more than twenty years.[56]

The complainant, Lee, claimed title to two parcels of real estate under a quitclaim deed from one Rose. Title to the property had been divested out of Rose and vested in the state by a decree in a delinquent tax suit in the late 1930's. Defendant Tennessee-Cumberland Corporation claimed title to one of the tracts and defendant Harrison to the other through one Seals who had purchased the tracts from the state in 1946. It was Lee's contention that the deed from the state to Seals and the deeds from Seals to the defendants were inoperative to pass any title for the reason that the tax proceeding was void. The invalidity of the tax suit was predicated upon the theory that Rose, named as party defendant in the tax proceeding, but not served by publication, had no notice of the proceeding against his land. It was also urged that the tax suit was invalid because the property which was the subject of the suit was inadequately described therein. The chancellor entered a decree for the complainant on the theory that the tax proceeding was void for both of the foregoing reasons; the decree was reversed by the court of appeals.

The supreme court, conceding that the property had been insufficiently described in the tax suit, nevertheless approved the reversal of the chancellor, holding that failure to comply with Section 1611 was fatal to complainant's case and that, anyway, the suit was barred by Section 9159.1 because of prolonged omission to pay taxes.

Section 1611 was held to be applicable notwithstanding any in-

53. TIFFANY, REAL PROPERTY 852 (Ab. ed. 1940).
54. 270 S.W.2d 173 (Tenn. 1954).
55. TENN. CODE ANN. § 1611 (Williams 1934).
56. TENN. CODE ANN. § 9159.1 (Williams Supp. 1952).

validity in the tax proceeding. Since complainant failed to tender the delinquent taxes, he was barred from suit. By its terms the statute contemplates a suit to invalidate a tax title. Undoubtedly any imperfection in the tax title ordinarily would result from irregularity or error in the delinquent tax suit. The decision seems a clearly correct interpretation of the meaning of the statute.

Though, strictly speaking, the complainant was not seeking to "recover" land in the literal meaning of Section 9159.1, the decision that, insofar as he claimed under the deed from Rose, he was barred by reason of the fact that neither he nor Rose had paid taxes for over twenty years, seems clearly to comport with the spirit of the statute.

A subsidiary issue raised in the case was whether the deed from the state to Seals or the deeds from Seals to the defendants were champertous. Either Lee or Rose, through whom he claimed, apparently had been in adverse possession of the land when the deeds were executed. The Court dismissed the contention of champerty by reiterating that the doctrine of champertous deeds has no application to deeds executed by the state.[57] The opinion, however, did not make clear why the deeds executed by Seals, a private vendor, were not champertous if, in fact, the land was at the time being possessed adversely.

*Adverse Possession: Running of Statute of Limitation Against Remainderman:* In *Edwards v. Puckett*[58] the complainant, in a suit for a declaratory judgment, sought to establish that he had a vested remainder in fee in a nine-sixteenths undivided interest in certain real property. His claim rested upon these facts: In 1896, his father and mother owned a seven-eighths undivided interest in the realty as tenants by the entirety and his father alone owned the other one-eighth undivided interest. In 1897, the parents were divorced and the divorce decree awarded the father's entire interest (nine-sixteenths) to the mother for life and after her death to the complainant. At the time of the divorce suit the property was encumbered to secure a promissory note to one Fleming.[59] Subsequently, the trust deed was foreclosed and the mother, who had remarried, and her new husband bought in the land for the amount of the debt. Those in possession when the instant suit was brought were remote grantees of the mother and step-father who purported to convey all the interest in the property in fee simple.

Twenty-odd years having elapsed since complainant attained his

57. For a discussion of the doctrine of champertous deeds in Tennessee, see Trautman, REAL PROPERTY, 6 VAND. L. REV. 1080-87 (1953).

58. 268 S.W.2d 582 (Tenn. 1954).

59. Defendants initially sought to attack the divorce decree as void insofar as it dealt with the encumbered property because the trustee of the trust deed was not before the court. *Held*, his security title was paramount and was not affected by the proceeding. He, therefore, was not a necessary party.

majority, the defendants sought to invoke both the statute of limitations and the doctrine of laches.[60]

The general rule, of course, is that the statute of limitations does not run against a remainderman until the death of the life tenant—the time when the remainderman's estate becomes possessory and enables him to maintain an action of ejectment.[61] When a stranger is in adverse possession, the life tenant only has a cause of action. When the life tenant himself claims under some color of title hostile to his remainderman's interest, however, and when the remainderman has actual notice that the title claimed by the life tenant in possession (or his grantee) is repugnant to his remainder interest, it has been held that the statute of limitations runs against the remainderman.[62] Inasmuch as possession by the life tenant or his grantee is on its face entirely consistent with a remainder interest in others, such possession, in order to be adverse, must be under circumstances which clearly indicate to the remainderman that the life tenant is holding not under his life tenancy but, in the ordinary situation, under a deed ostensibly conveying a greater estate. The typical case is that of a widow claiming not under her dower right but under a deed from one of her husband's heirs.[63]

The exception to the general rule in the case of a hostile claim by the life tenant was recognized in *Quarles v. Arthur*,[64] and it is within this exception that the defendants sought to bring the instant case. But the court held that, by buying in the property at the foreclosure sale, the defendants did not acquire a title adverse to the life tenant, but merely effected a redemption of the property.[65] That a life tenant, by satisfying an encumbrance of the property, cannot prejudice the interest of a remainderman is a proposition finding ample support in the Tennessee cases.[66]

It is submitted, however, that under the exception, the material consideration is not whether the life tenant acquired a valid fee simple

60. The suit was held not to be barred by laches, as the defendants were not prejudiced by complainant's delay in seeking a declaratory judgment. The declaratory judgment remedy was available to the defendants, had they desired an earlier adjudication of their title. 268 S.W.2d at 588.

61. 1 AMERICAN LAW OF PROPERTY 601-02 (Casner ed. 1952); 3 *Id.* at 802-03 (Casner ed. 1952); 4 TIFFANY, REAL PROPERTY 523-24 (3d ed. 1939).

62. Hays v. Lemoine, 156 Ala. 465, 47 So. 97 (1908); Tillotson v. Foster, 310 Ill. 52, 141 N.E. 412 (1923); 3 AMERICAN LAW OF PROPERTY 805-06 (Casner ed. 1952).

63. Tillotson v. Foster, 310 Ill. 52, 141 N.E. 412 (1923).

64. 33 Tenn. App. 291, 300, 231 S.W.2d 589, 592-93 (E.S. 1950).

65. In Quarles v. Arthur it was further held that the attempted conveyance of a fee simple by the life tenant was insufficient to start the running of the statute. 231 S.W.2d at 592. By the weight of authority, such a conveyance is operative to transfer only that interest held by the grantor. 4 TIFFANY, REAL PROPERTY 525 (3d ed. 1939). See generally, Note, 112 A.L.R. 1042 (1938).

66. Miller v. Gratz, 3 Tenn. App. 498, 507-11 (E.S. 1926); see Trautman, *Future Interests and Estates—1954 Tennessee Survey*, 7 VAND. L. REV. 843, 850 (1954).

by bidding in the property, but whether the transaction afforded some color of title which, when the fee was claimed thereunder, would characterize the life tenant's possession as patently hostile to the remainderman's interest. In an Illinois case,[67] for example, a widow, entitled to dower, claimed instead the fee under a deed executed by one of several remaindermen who were tenants in common. The deed was obviously ineffective to impair the interests of the other remaindermen. Nevertheless, the widow was held to have acquired title by adverse possession under the color of the deed.

Though the Tennessee Court did not expressly disapprove of the exception, the decision makes it clear that only the rarest kind of case will escape the application of the general rule protecting remaindermen against adverse possessors.

### EMINENT DOMAIN

*Extent of Power to Take: Reviewability of Condemnor's Choice of Location:* In *Harper v. Trenton Housing Authority*,[68] the housing authority sought in condemnation proceedings to acquire under its delegated right of eminent domain three contiguous, vacant lots in Trenton, Tennessee, for the purpose of constructing thereon a housing project for low income Negro families. The defendant landowners, all white, insisted that the value of the surrounding property would be depreciated by locating the housing project in the proposed spot, that "a condition of fear and anxiety for the safety of the women and children in the community" would result.

There were two legal defenses seriously asserted: (1) that the housing authority was without power to condemn vacant lots, but rather was authorized to acquire only slum areas for the purpose of eliminating substandard dwellings; and (2) that the authority was guilty of a palpable abuse of discretion in selecting the particular location.

The Western Section of the Tennessee Court of Appeals in a lucid opinion by Judge Carney held that the authority could properly condemn vacant lots inasmuch as the mere elimination of slum areas without the construction of new dwellings to house the evacuees therefrom would frequently result in increased congestion—the elimination of which is one of the purposes of the housing authority.[69]

As to the second defense, the court reasserted the well-settled rule that the decision of the legislature or its delegate as to what property should be taken under the power of eminent domain is reviewable by

67. Tillotson v. Foster, 310 Ill. 52, 141 N.E. 412 (1923).

68. 274 S.W.2d 635 (Tenn. App. W.S. 1953). The same case was before the Tennessee Supreme Court earlier in this survey period. Harper v. Trenton Housing Authority, 271 S.W.2d 185 (Tenn. 1954). The case there turned on a procedural issue and will not be discussed here.

69. See TENN. CODE ANN. § 3647.9 (Williams 1934).

the courts only for fraud, bad faith or gross abuse of discretion.[70] This rule issues from the theory that, given the legislative authority to take, the court is without power to interfere with the purely legislative function other than to determine that the due process requirements of the constitution have been met.[71] Applying the rule to the facts of the case, the court found only a difference of opinion between the landowners and the housing authority as to the desirability of the particular location—nothing indicative of bad faith or palpable abuse of discretion.

*Interest: Payable from Time of Taking: Nashville Housing Authority v. Doyle*[72] was a condemnation proceeding involving the single question whether interest is payable upon the sum paid into court pursuant to the statute by the condemnor[73] at the time the declaration of taking is filed. The statute is silent upon the subject. The court held that interest accrued on the cash deposit from the time of the taking. The clause of the Tennessee Constitution prohibiting the taking of property for public use without just compensation[74] was held to militate such a result inasmuch as under the statute title vests in the condemnor on the filing of the declaration of taking.

## LANDLORD AND TENANT

*Lease Executed by One Tenant by the Entirety: Right of the Other Tenant by the Entirety to Repudiate:* In *Irwin v. Dawson,*[75] the Dawsons were owners of a lot as tenants by the entirety. Dawson entered into a ten year lease with the complainant in the presence and with the knowledge of his wife, but the wife did not sign the lease. It appeared that she did not know, at the time the lease was executed, of her interest in the property. After the lessee, pursuant to the contract, had supervised the construction of a building upon the property and entered into possession, Dawson died and his widow repudiated the lease. The lessee's suit for specific performance was met by the widow's plea of the statute of frauds. The chancellor held that the statute was an effective defense and his decree for the widow was affirmed by the supreme court.

The complainant lessee sought to work out an estoppel on the basis that the defendant knew of the contents and import of the lease. The court, however, applied the well-established rule that an estoppel arises only where one is, without negligence on his part, misled, to his

70. Williamson County v. Franklin & Spring Hill Turnpike Co., 143 Tenn. 628, 228 S.W. 714 (1921); 6 NICHOLS, EMINENT DOMAIN § 26.731[2] (3d ed. 1953), 18 AM. JUR., *Eminent Domain* § 108 (1938).
71. 5 THOMPSON, REAL PROPERTY 371 (perm. ed. 1940).
72. 276 S.W.2d 722 (Tenn. 1955).
73. TENN. CODE ANN. § 3130 (Williams 1934).
74. TENN. CONST. Art. I, § 21.
75. 273 S.W.2d 6 (Tenn. 1954).

prejudice, by the conduct of another.[76] Here the lessee could not claim to have been deceived as to the defendant's interest in the property, inasmuch as the deed disclosing the tenancy by the entirety was of record. Furthermore, the defendant's silence and inaction, in the absence of a duty to speak or to sign the instrument, could not be construed as expressing a tacit approval or commitment regarding the lease.

The lessee also sought to invoke the rule followed in many jurisdictions that part performance of an oral contract concerning realty removes the contract from the inhibitions of the statute of frauds.[77] The court dismissed this contention by noting that the doctrine of "part performance" is not recognized in Tennessee.[78]

*Subrogation: Right of Sublessee to Succeed to the Power of Forfeiture of His Lessor's Creditor:* In *Amos v. Central Coal Co.*[79] after a series of assignments by both the original lessor and lessee of coal mining property, it came to pass that Amos was a sublessee of the Central Coal Company. The coal company was under a duty to make certain payments to one Harrison. In the event that the coal company should default, Harrison had the right to possess all of the property, mining operations and equipment, thus causing the coal company to forfeit all its interest in the coal lease including that portion of the property sublet to Amos. The coal company defaulted. Amos thereupon paid Harrison the sum owed by the coal company in order to protect his own valuable interest and sought to be subrogated to Harrison's right to compel a forfeiture of the coal company's interest. There was no equity in the coal company's interest above the amount paid by Amos. The Middle Section of the Tennessee Court of Appeals affirmed a decree of the chancellor terminating and forfeiting the coal company's interest and vesting the same in Amos.

As the court points out, subrogation is an extremely flexible remedy.[80] The equitable right upon which the remedy exists is commonly invoked for the protection of one who, being under no obligation to do so, pays off the mortgage debt on property in which he has an interest.[81] The right of Harrison to terminate the lease in the instant case, a mere security device, is quite analogous to the right of a mortgagor to foreclose upon default by the mortgagee. The result seems a sound application of the basic principle that one who pays the debt of another, not as a volunteer or a primary obligor, is entitled

76. Crabtree v. Bank, 108 Tenn. 483, 67 S.W. 797 (1902); 5 THOMPSON, REAL PROPERTY § 2612 (perm. ed. 1940).
77. 3 THOMPSON, REAL PROPERTY §§ 1233-34 (perm. ed. 1940).
78. Webb v. Shultz, 184 Tenn. 235, 198 S.W.2d 333 (1946). See Note, 2 VAND. L. REV. 451 (1949).
79. 277 S.W.2d 457 (Tenn. App. M.S. 1954).
80. Walker v. Walker, 138 Tenn. 679, 200 S.W. 825 (1918). See generally, 4 POMEROY, EQUITY JURISPRUDENCE § 1419 (5th ed. 1941).
81. 4 POMEROY, EQUITY JURISPRUDENCE § 1211 (5th ed. 1941).

to succeed to the rights of the satisfied obligee.[82]

*Tort Liability of Landlord: Injuries from Unknown Latent Defects:* The case of *Glassman v. Martin*[83] involving the tort liability of a landlord for injuries sustained by a tenant as a result of latent defects in the premises, is discussed in the Torts section of this survey.[84]

82. 9 THOMPSON, REAL PROPERTY § 5052 (perm. ed. 1940).
83. 269 S.W.2d 908 (Tenn. 1954).
84. Wade, *Torts—1955 Tennessee Survey, infra* at 1142.