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Real Property

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REAL PROPERTY

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The Tennessee cases in the fields of Real Property and Future Interests have been quite abundant during the period[1] covered by this Survey. Because of the number of cases and the very interesting and novel problems presented in some of them, and because the scope of the law of Future Interests includes cases which involve Wills and Personal Property as well as Real Property, it is believed that the reader will find it more feasible to consider the Future Interest cases in a separate article appearing in this Survey. Therefore, notwithstanding some overlapping, the emphasis of this article will be limited to those Real Property cases decided during the Survey period which do not depend wholly upon principles of the law of Future Interests.

I. TITLES

Champertous Deeds: There were two cases, *Young v. Unknown Heirs of Little*[2] and *Frumin v. May*,[3] which involved the statutory prohibition against champertous conveyances. Of these two, the one which brings into focus the need for a clear definition of the basic substantive concept of champertous deeds is the *Young case.* This opinion referred to a previous opinion rendered by the same court in this case in 1949.[4] Because of the rather involved fact situation, the case will be stated in detail after a preliminary consideration of the statutory principle.

In accord with the sixteenth century English Pretended Title Act,[5] the Tennessee statutory rule is that a deed of conveyance executed and delivered by a title owner while the land is held in the adverse possession of another is "utterly void."[6] Prior to the Statute of

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1. The scope of this Survey is limited to those decisions of the Supreme Court of Tennessee and the Court of Appeals of Tennessee and those decisions of the federal courts rendered in cases from Tennessee which were published between June 1, 1952, and June 1, 1953.

2. 249 S.W.2d 580 (Tenn. App. E.S. 1952).

3. 251 S.W.2d 314 (Tenn. App. E.S. 1952).

4. Young v. Little's Unknown Heirs, 34 Tenn. App. 39, 232 S.W.2d 614 (E.S. 1949).

5. 32 HENRY VIII, c. 9 (1540).

6. TENN. CODE ANN. §§ 7823, 7824 (Williams 1934); Kitchen-Miller Co. v. Kern. 170 Tenn. 10, 91 S.W.2d 291 (1936); Green v. Cumberland Coal & Coke Co., 110 Tenn. 35, 38, 72 S.W.459, 460 (1903); Bullard v. Copps, 21 Tenn. 408, 37 Am. Dec. 561 (1841). *But cf.* Ferguson v. Prince, 136 Tenn. 543, 190 S.W. 548 (1916); Key v. Snow, 90 Tenn. 663, 18 S.W. 251 (1891); Ruffin v. Johnson, 52 Tenn. 604 (1871); Nance's Lessee v. Thompson, 33 Tenn. 320, 327 (1853);

Uses (1535), when livery of seisin was essential to the conveyance of a legal freehold interest in land, it was considered impractical and perhaps legally impossible to attempt to make livery, with its attendant community publicity, when the land was in the adverse possession of another.[7] But the Statute of Uses made possible the conveyance of a legal freehold interest in land by informal and private agreement between persons who might be many miles distant from the land, without the trouble of going to the land and making a formal entry for the performance of the ritual of livery of seisin. When the publicity of livery of seisin was thus abolished by operation of the Statute of Uses, and when the Statute of Enrollments as an experiment in the public recording of land transfers failed as a substitute in this respect, it was understandable that there was enacted in England in 1540 a Pretended Title Act,[8] making it unlawful to buy or sell a purported right or title to real property of which the vendor had not been in possession personally or by tenant throughout the preceding year.[9] This statute is often spoken of as an affirmance of the common law,[10] but it certainly went further than the earlier law and actually made bad some conveyances which at common law would have been good. By the earlier law, an adverse possessor did not have to be in possession for a year before making a conveyance, but after this statute he had to be so. By the earlier law, the true owner did not have to wait a year after he re-entered before conveying, yet by a literal construction of this statute he was required to do just that, though a more liberal construction was advocated in Tennessee.[11]

The mischief at which the act was aimed "was that individuals possessed of rights, real or pretended, transferred them to persons more able, or more disposed, than themselves to litigate them. This was considered to be a great evil."[12] Chancellor Kent attempted to state the public policy of the doctrine to be "the general sense and usage of mankind, that the transfer of real property should not be valid, unless the grantor hath the capacity, as well as the intention, to deliver pos-

Wilson & Wheeler v. Nance & Collins, 30 Tenn. 188 (1850); Stockton v. Murray, 25 Tenn. App. 371, 157 S.W.2d 859 (M.S. 1941), for the all-important qualification which Tennessee equity courts have engrafted upon this common law-statutory rule in accord with all other states in the United States except Kentucky and Connecticut.

7. That it might have been legally possible to do this, see Costigan, *The Conveyance of Lands by One Whose Lands Are in the Adverse Possession of Another*, 19 HARV. L. REV. 267, 271-275 (1906).

8. See note 5 *supra*.

9. See Costigan, *supra* note 7, at 275. The statute provided both civil and criminal sanctions to such an attempted transfer.

10. 6 THOMPSON, REAL PROPERTY § 3043 (Perm. ed. 1940); 5 TIFFANY, REAL PROPERTY § 1331 (3d ed., Jones, 1939).

11. Kincaid v. Meadows, 40 Tenn. 188 (1859); Whiteside v. Martin, 15 Tenn. 283 (1835).

12. Costigan, *supra* note 7, at 276, quoting Maule, J., in Doe *d.* Williams v. Evans, 1 C.B. 717, 135 Eng. Rep. 724 (1845).

session."[13] Blackstone stated the reason of the rule to be "lest pretended titles might be granted to great men, whereby justice might be trodden down, and the weak oppressed."[14] But a Tennessee federal judge in 1893 proposed as a better explanation for the Tennessee statutes that "[I]t was no fear of nobles or great men, or their influence with courts and juries, that produced these Tennessee statutes . . . but it was the hostility of public sentiment to the 'land sharks' who were speculating in litigation over defective titles, and particularly *to lawyers* lending themselves to this speculation for profit, which provoked statutes seeking to enlarge the English acts just because they did not reach the evil sought to be suppressed." (emphasis supplied)[15]

This early English statutory doctrine has received only a small recognition in the United States.[16] The doctrine of seisin consisted of physical possession of a freehold interest in land plus the relational rights, powers, privileges and duties of political, social and economic significance inherent in the feudal system. Commercial transactions in land were few and far between in the feudal society, and the principal emphasis of litigation among those in that society was on *possession.* In the United States, the general abandonment of the significance of seisin and the heavy emphasis in the Nineteenth and Twentieth Centuries on the reliability of public record titles to safeguard banking and commercial transactions in land by people not in actual physical possession have resulted in an entirely different situation. The "pests of civil society"[17] in the United States today are not those who seek the ascertainment of true ownership under a clear record title, but rather are those intentional wrongdoers who seek to gain a legal right by the commission of a legal wrong when they enclose a quarter of an acre on the back side of a mountain under a spurious deed covering the whole mountain, which is nevertheless sufficient to provide color of title[18] and "constructive" adverse possession to the whole.[19] The result

13. 4 KENT'S COMM. *448, cited with approval in Wilson & Wheeler v. Nance & Collins, 30 Tenn. 188 (1850), and Ruffin v. Johnson, 52 Tenn. 604 (1871).

14. See 6 THOMPSON, REAL PROPERTY § 3043 (Perm. ed. 1940).

15. Hammond, J., in Byrne v. Kansas City, Ft. S. & M.R.R., 55 Fed. 44, 47 (C.C.W.D. Tenn. 1893).

16. See Note, 35 L.R.A. (N.S.) 729 (1912). This comprehensive note indicates that by 1911 only two American jurisdictions remained in which the champerty rule was still in force as a common law principle and that in only five states, including Tennessee, were there then statutes prohibiting the transfer of the true owner's interest during adverse possession.

17. See Hammond, J., *supra* note 15, at 46, quoting Blackstone.

18. TENN. CODE ANN. § 8582 (Williams 1934).

19. See Kitchen-Miller Co. v. Kern, 170 Tenn. 10, 91 S.W.2d 291 (1936); Green v. Cumberland Coal & Coke Co., 110 Tenn. 35, 38, 72 S.W. 459, 460 (1903). It is not without significance that most of the cases involving the champerty rule in Tennessee seem to have come from East Tennessee where the mountain terrain would seem to make the detection of squatters or trespassers in a cove on the land less likely. When difficulty of detection is combined with the rule that it does not require any length of adverse possession to make a conveyance by the true owner champertious, see Bullard v. Copps,

has been that, in the few jurisdictions where the doctrine had gained recognition as a rule of law,[20] the courts of equity have modified the rule by holding that the deed of a grantor out of possession is not absolutely void, but void only as against the adverse claimant in possession. It is good as between the parties and persons standing in privity with them; and the grantee is entitled, even as against the adverse possessor, to bring an action in the name of the grantor to recover the land; and if the grantor recovers possession of the land from the adverse possessor, it inures to the benefit of the grantee in the "champertous" deed.[21] Furthermore, the rule of law itself has been held to have no application to judicial transfers, transfers by operation of law, conveyances made in performance of an executory contract entered into before the adverse posession, conveyances made by the state and correction deeds.[22] Thus, the limited recognition gained by the harsh champerty rule of law seems to have been abolished either by statute or court decision in all of the states except Kentucky and Connecticut.[23] That its tendency is to increase rather than decrease litigation would seem clear from the long line of discriminating cases involving the rule to be found in the *General* and *Decennial Digests* from Kentucky alone.

Recent Tennessee cases have not always made it clear that the harsh words of the statutory prohibition have been substantially modified by a long line of nationally recognized Tennessee equity cases[24] holding that the transfer is good as between the grantor and the grantee and all persons in privity with them; that the grantee is entitled to sue in the name of the grantor; and that, if the grantor recovers possession from the adverse possessor, it inures to the benefit of the grantee. This

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21 Tenn. 408, 37 Am. Dec. 561 (1841), the potentiality of harassment and risk to commercial dealings in land can be better appreciated.

20. See Bordwell, *Seisin and Disseisin*, 34 HARV. L. REV. 717, 734-36 (1921).

21. Ferguson v. Prince, 136 Tenn. 543, 190 S.W. 548 (1916); Key v. Snow, 90 Tenn. 663, 18 S.W. 251 (1891); Ruffin v. Johnson, 52 Tenn. 604 (1871); Nance's Lessee v. Thompson, 33 Tenn. 320, 327 (1853); Wilson & Wheeler v. Nance & Collins, 30 Tenn. 188 (1850); Stockton v. Murray, 25 Tenn. App. 371, 157 S.W.2d 859 (M.S. 1941); see PATTON, TITLES § 121 (1938); 6 THOMPSON, REAL PROPERTY § 3043 (Perm. ed. 1940); 5 TIFFANY, REAL PROPERTY § 1331, (3rd ed., Jones, 1939); see also Costigan, *supra* note 6, at 280-82.

22. 6 THOMPSON, REAL PROPERTY § 3043 (Perm. ed. 1940) and cases there cited. See also Anderson v. Akard, 83 Tenn. 146 (1885); Augusta Mfg. Co. v. Vertrees, 72 Tenn. 75 (1879); McCoy v. Williford, 32 Tenn. 641 (1853).

23. 3 AMERICAN LAW OF PROPERTY § 12.69 (Casner ed. 1952); PATTON, TITLES § 121 (1938).

24. Kitchen-Miller Co. v. Kern, 170 Tenn. 10, 15, 91 S.W.2d 291, 294 (1935), and Green v. Cumberland Coal & Coke Co., 110 Tenn. 35, 38, 72 S.W. 459, 461 (1903), are to be criticized for strong language in each case emphasizing that the deed was champertous and "utterly void" without mentioning the several earlier Tennessee equity cases. See in particular Key v. Snow, 90 Tenn. 663, 669, 18 S.W. 251, 253 (1891); Nance's Lessee v. Thompson, 33 Tenn. 320, 327 (1853); Wilson & Wheeler v. Nance & Collins, 30 Tenn. 188 (1850); see also Ferguson v. Prince, 136 Tenn. 543, 190 S.W. 548 (1916); Stockton v. Murray, 25 Tenn. App. 371, 157 S.W.2d 859 (M.S. 1941).

uncertainty is reflected in the two opinions in the subject case of *Young v. Unknown Heirs of Little.*

In the *Young* case, Margaret Little died intestate, the owner of three lots with a dwelling, and A. F. Littleton qualified as administrator in 1930. He also acted as agent for the collection of rents and accounted to some of the known heirs of Margaret Little. But the taxes were not paid for several years; and in 1938 the State filed a chancery proceeding, and the land was sold pursuant to court decree and bought in by the State. However, Littleton continued to collect the rents after this, and in 1940 he rented the property to C. K. Young and his wife. In 1943 Young made a contract with the group of "known" heirs to whom Littleton had been accounting, designated as the "Grace Zeh" group, for the purchase of the property. Up to this point, the Youngs were apparently under the impression that the Zeh group could give them a complete title. When they discovered that this was not true, they decided nevertheless to close the transaction with the Zeh group. Accordingly, they paid the delinquent taxes, paid the balance of the contract price to the escrow agent and procured deeds both from the Grace Zeh group of heirs and from the Tennessee Commissioner of Finance and Taxation. They then filed the present suit to have any claims which might be made on behalf of the "unknown" heirs of Margaret Little declared void and removed as a cloud on their title.

While the Youngs were closing their transaction with the Zeh group, Littleton had found most of the "unknown" heirs of Margaret Little and had procured deeds of conveyance from them to himself, so that his interest amounted to 2710/3000 of the complete title. The trial court found that all of the deeds were secured by Littleton after he learned of the deed from the Grace Zeh group to the Youngs; the Court of Appeals in the 1949 opinion held that, therefore, the deeds to Littleton were champertous and void. The Court apparently considered the possession of the Zeh group, and therefore the Youngs, as adverse to the ownership interests of their cotenants, the "unknown" heirs, although this conclusion would not seem to be at all clear. But the Court in 1949 went ahead to hold that Young and his wife had secured the "entire fee simple title" to the property by virtue of the deed from the "Zeh Group" and the deed from the Commissioner of Finance and Taxation. Thus, the real property rights both of the "unknown heirs" and of Littleton were cut off and eliminated. This result would certainly be proper if the decision was based upon the validity of the tax deed purchased from the State. But it has never been a part of the doctrine under the Pretended Title Act that a conveyance by one whose lands are in the adverse possession of another causes a destruction and elimination of the grantor's interest. Indeed, the Tennessee law cases, as well as the equity cases and the authority elsewhere, have made it

abundantly clear that, though the deed is void as against the legal rights acquired by the adverse possessor, the grantor can always disregard his deed and sue the adverse possessor in ejectment in a court of law.[25] In this respect, the "right of entry" of the true owner is different from the future interest right of entry resulting from the creation of a fee simple subject to a condition subsequent.[26]

In the 1952 opinion, the Eastern Section of the Court of Appeals held that, notwithstanding the conclusion in 1949 that neither the heirs, other than the Zeh group, nor Littleton had any property rights in the land, Littleton as grantee in the "champertous" deeds was entitled to be subrogated to the rights of such heirs to 2710/3000 of the balance of the purchase price on deposit with the escrow agent. The Court relied on the equity rule that a champertous deed is good between the parties to it and that the grantee is entitled to sue in the name of the grantor.

Insofar as the basic substantive concept of the champerty rule is relevant to a proper determination of this case, the 1952 opinion correctly applied the well-settled equity modification of the harsh statutory rule. But it is submitted that the complete elimination of Littleton's property rights in the land accomplished by the 1949 opinion cannot be justified on the basis of the champerty rule. On the other hand, if the tax deed from the State was the sole basis for adjudicating complete title in the Youngs, it is of interest to contemplate upon what legal basis either Littleton or his grantors may be allowed to share in the purchase price paid to the escrow agent. It would seem that that sum was paid as the purchase price for the fractional interest of the Zeh group. Probably justice was accomplished somehow or other in this case,[27] but the application of the concept of champertous deeds for the solution of the problem seems to be strained and somewhat confused.

Suits against the "unknown heirs" or other unknown successors in interest to a deceased record title owner, such as in the principal case, are in most states authorized by one comprehensive statute which covers all types of actions for the determination of interests in land

25. Green v. Cumberland Coal & Coke Co., 110 Tenn. 35, 38, 72 S.W. 459, 460 (1903); see other cases and commentators cited in notes, 6, 7, 16, 21 and 24 *supra.*

26. The older traditional view has been that not only is the right of entry for condition broken (called a "power of termination" by the American Law Institute, Simes and other contemporary authorities) not transferable, but, indeed, the mere attempt to transfer it results in its complete destruction and elimination from the title. Board of Education v. Baker, 124 Tenn. 39, 134 S.W. 863 (1911); Newman v. Ashe, 68 Tenn. 380 (1876); See 1 AMERICAN LAW OF PROPERTY § 4.68 (Casner ed. 1952); 2 POWELL, REAL PROPERTY § 282 (1950); 3 SIMES, FUTURE INTERESTS § 716 (1936); Note, *Alienability of Future Interests in Tennessee,* 5 VAND. L. REV. 80, 88-92 (1951).

27. Compare the consoling thoughts of Aunt Polly after she had walloped Tom Sawyer for breaking the sugar bowl and then learned to her astonishment that Sid had done it: "Umf! Well, you didn't get a lick amiss, I reckon. You been into some other audacious mischief when I wasn't around, like enough." CLEMENS, ADVENTURES OF TOM SAWYER 18 (1933).

within the state.[28] While the Tennessee statutes are somewhat scattered, with possible distinctions between partition suits and actions to quiet title and other types of actions, the statutory authority and procedure for bringing a suit styled in this manner and for service of process by publication would seem to be perfectly clear.[29]

The second case, *Frumin v. May*,[30] further demonstrates the failure of the Eastern Section of the Court of Appeals to keep in mind the well-established equity modification of the literal words of the champerty statute. One of the issues in this case was whether the defendant had acquired title by seven years' adverse possession of a strip of 2.9 feet off the side of the plaintiff's lot. The defendant had fenced in his lot and included the strip in 1937. The plaintiffs purchased their lot in 1941. In holding that, where a purchaser of land in Tennessee accidently or by mistake incloses a contiguous strip, believing he is placing the fence on the true boundary, and holds the inclosed strip for 7 years, his possession is adverse and will prevail over the true owner,[31] the Court went ahead to say that the plaintiff's did not acquire title to the fenced-in strip, because it was adversely held by the defendant on the date of their deed. "Under our authorities, this made complainants' deed champertous and void as to the inclosed strip." It is submitted that the plaintiffs had the same substantive right to challenge the defendant's adverse claim as their grantor had; and even a complete statement of the champerty rule would not lend anything to the solution of this case.

The Tennessee Pretended Title Act was enacted in 1821 at a time when it was of considerable interest to the State to assist its pioneer settlors in getting their land claims cleared and protected against eastern land speculators. In mid-twentieth century Tennessee, when land titles have been evidenced for many years by tax assessor's plat books and deed records, the emphasis would seem to have shifted from *possession* to the *reliability of record titles* in order to make commercial transactions in land more secure.

It is to be hoped that in the near future the legislature will repeal the so-called champerty statute. With the equity modification of the literal statutory language redefining the basic substantive concept, the statute itself can only be a source of confusion at best; and the equity

28. See 4 POMEROY, EQUITY JURISPRUDENCE § 1396 (5th ed. 1941) for a list of such statutes.

29. TENN. CODE ANN. §§ 10388(1), 10388(2), 10388(4), 10431-10440 (Williams 1934) for quiet title suits and quasi *in rem* actions generally; TENN. CODE ANN. §§ 9175, 9176 (Williams 1934) for partition suits in particular. See GIBSON, SUITS IN CHANCERY §§ 196-200, 1042 (4th ed., Higgins & Crownover, 1937); 4 POMEROY, EQUITY JURISPRUCENCE §§ 1393-1399 (5th ed. 1941); see also Ray v. Haag, 1 Tenn. Ch. App. 249 (1901); Creswell v. Smith, 2 Tenn. Ch. Rep. 416 (1875).

30. 251 S.W.2d 314 (Tenn. App. E.S. 1952).

31. This point is discussed in the following subsection on Adverse Possession.

remedy is likely to be an unnecessary procedural trap for the unwary.

Adverse Possession: Frumin v. May[32] followed the recent Supreme Court case of *Liberto v. Steele*[33] in holding that encroachment upon the adjoining land under an honest mistake as to the true boundary line does not prevent the possession from being adverse so that title will be gained after the requisite number of years. As pointed out in recent reviews of this question,[34] there is a split of authority on whether the adverse possessor must actually intend to steal his neighbor's land. The *Liberto* case affirmed the earlier leading case of *Erck v. Church*,[35] holding that the Court will not burden itself by looking into the possessor's state of mind to see whether he intended to hold to the extent of the inclosure or only to the true boundary; and this notwithstanding the later criticism of the *Erck* case in *Buchanan v. Nixon*.[36] While there are several states which hold that title by adverse possession will not be acquired if the adverse possessor intended to occupy only to the true boundary line,[37] Tennessee now seems to be well committed to the rule of the *Erck* case that proof of intent to hold adversely is not necessary, and apparently *Buchanan v. Nixon* will not be followed. In 1946 the Eastern Section of the Court of Appeals stated what the commentators regard as the better rule — namely, that, in the absence of any proof showing that the possessor holds with the consent of the true owner, a presumption of intent to hold adversely will be made upon proof of exclusive possession for the requisite period.[38] This elimimates the necessity for having special proof of intent in each case and at the same time preserves intact the all-important requisite that the true owner must have a cause of action against the adverse possessor for the prescribed period in order for the latter to gain title by adverse possession.

In *Hutchison v. Board*,[39] the Supreme Court reaffirmed the rule that the statute of limitations does not run against a remainderman until the death of the life tenant or until the remainderman has a right to possession. This doctrine had been previously recognized in Tennessee[40] and is in accord with the universal weight of authority.[41]

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32. 251 S.W.2d 314 (Tenn. App. E.S. 1952).
33. 188 Tenn. 529, 221 S.W.2d 701 (1949), 3 VAND. L. REV. 337 (1950).
34. Note, *Title by Adverse Possession in Tennessee*, 5 VAND L. REV. 621, 631 (1952); 21 TENN. L. REV. 207 (1950); 3 VAND. L. REV. 337 (1950). See also Note, 97 A.L.R. 14 (1935).
35. 87 Tenn. 575, 11 S.W. 794, 4 L.R.A. 641 (1889).
36. 163 Tenn. 364, 43 S.W.2d 380, 80 A.L.R. 151 (1931).
37. See 4 TIFFANY, REAL PROPERTY § 1159 (3d ed., Jones, 1939); Note, 97 A.L.R. 14 (1935).
38. Gibson v. Shular, 29 Tenn. App. 166, 194 S.W.2d 865 (E.S. 1946); see 4 TIFFANY, REAL PROPERTY § 1159 (3d ed., Jones, 1939); Notes, 80 A.L.R. 153, 157 (1931), 97 A.L.R. 14 (1935).
39. 250 S.W.2d 82 (Tenn. 1952).
40. Carver v. Maxwell, 110 Tenn. 75, 71 S.W. 752 (1902).
41. 4 TIFFANY, REAL PROPERTY § 1184 (3d ed., Jones, 1939).

Deeds Creating Tenancies by Entireties: In *Hardin v. Chapman*,[42] the Eastern Section of the Court of Appeals held that a deed to "H. H. Brown and his wife, Mary Brown, equally and jointly" created a tenancy by the entirety with its consequent right of survivorship. The Court distinguished *Myers v. Comer*,[43] where a deed to *H* and *W*, "their heirs and assigns forever jointly and severally in equal moities" was held to create either a joint tenancy or a tenancy in common, but not a tenancy by the entirety. The Court also distinguished *Faulkner v. Ramsey*,[44] where extrinsic evidences was admitted to show that a deed to a husband and wife "to have and to hold the said land . . . equally their heirs and alienees" created a tenancy in common.

It was once thought that a conveyance of real property to husband and wife necessarily resulted in the creation of a tenancy by the entirety, the husband and wife being considered as a single entity with the right of survivorship an incident of it; therefore, a conveyance to husband and wife as "tenants in common" or as "joint tenants" was nevertheless construed to create a tenancy by the entirety.[45] But in Tennessee today, as in the large majority of other states, a tenancy in common or a joint tenancy can be created by a deed to husband and wife *if the intention of the grantor to create such an estate is made to clearly appear.*[46] However, if the deed contains no words describing or characterizing the estate they are to take, an intention to create a tenancy by the entirety will be presumed.[47] It is said not to be essential that they be described as husband and wife,[48] and describing them as such will be ineffectual if they are not legally husband and wife.[49] In Tennessee, a deed to a named person "and wife" has been held to create a tenancy by the entirety in the named person and his present lawful wife.[50]

Thus, it appears that whether a tenancy by the entirety, with its attribute of survivorship, or a tenancy in common will be created is primarily a problem of construction. In view of the presumption noted, if a conveyancer does not want a deed to a husband and wife to create a tenancy by the entirety, he can create one of the other concurrent tenancies by making the grantor's intention explicit.

42. 255 S.W.2d 707 (Tenn. App. E.S. 1952).
43. 144 Tenn. 475, 234 S.W. 325 (1921).
44. 178 Tenn. 370, 158 S.W.2d 710 (1942).
45. Walthall v. Goree, 36 Ala. 728 (1860); Wayman v. Johnston, 62 Colo. 461, 163 Pac. 76, (1917); Wilson v. Frost, 186 Mo. 311, 85 S.W. 375 (1905); Young's Estate, 166 Pa. 645, 31 Atl. 373 (1895); 2 AMERICAN LAW OF PROPERTY § 6.6 (Casner ed. 1952) and authorities there cited.
46. Mullens v. Mullens, 161 Tenn. 165, 29 S.W.2d 261 (1930); Myers v. Comer, 144 Tenn. 475, 234 S.W. 325 (1921); Thomason v. Smith, 8 Tenn. App. 30 (W.S. 1928); See Note, 161 A.L.R. 457, 461 (1946).
47. Bost v. Johnson, 175 Tenn. 232, 133 S.W.2d 491 (1939); Myers v. Comer, 144 Tenn. 475, 234 S.W. 325 (1921); PATTON, TITLES § 146 (1938).
48. PATTON, TITLES § 146 (1938).
49. McKee v. Bevins, 138 Tenn. 249, 197 S.W. 563 (1917).
50. Ballard v. Farley, 143 Tenn. 161, 226 S.W. 544 (1920).

Highways and Railways as Boundaries: An interesting question concerning the ownership of an abandoned railroad right of way existing between a public highway on one side and a platted lot on the other side was raised in *McKinney v. Davidson County*.[51] In 1904 the owners of a large acreage bordering on Nolensville Pike conveyed a 30 foot strip of land along their property to the Nashville Railway & Light Co., reserving a right of ingress and egress and providing for a reverter to the grantors if the railroad line should fail to operate for 30 days. In 1905 the owners platted the remaining acreage into a subdivision of lots, the boundaries of which were described by metes and bounds as bordering on the railroad right of way. After several conveyances, the defendants acquired title to a portion of a lot adjacent to the railroad right of way, and in 1942 the railway company abandoned its line. The defendants cleared off the right of way and used it thereafter as a parking area for their restaurant. This was a condemnation suit by the county. The county was willing to pay the defendants for 7 feet taken from their lot as platted. But the defendants contended that they were also entitled to be paid for the 30 foot railroad right of way opposite their platted lot. The Supreme Court held for the defendants.

Would the heirs and successors in interest of the original grantors in the 1904 easement deed have any rights against the county under the possibility of reverter reserved in that deed? When a grantor uses as a boundary line a public or private right of way, the courts generally construe the description of the fee to extend as far as the grantor owns, subject to any existing easement, unless a contrary intent is clearly expressed.[52] More often than not, land is divided by a right of way easement, so that a subsequent grantee of the land on one side of it will be held to own the fee to the center of the right of way. But frequently the easement is originally created off of the side of the grantor's land, in which case the subsequent owner of the land adjacent to the right of way will be held to own the fee to the entire right of way.[53] While the Court did not discuss it in the instant case, this rule is only a rule of construction and will always give way to proof showing clearly that the original grantor who used the right of way as a monument of boundary intended to convey only up to the right of way.[54] Therefore, if this rule of construction is applied to the conveyance of the 1905 platted lot, the defendants would seem to have

51. 254 S.W.2d 975 (Tenn. 1953).
52. 8 AM. JUR., *Boundaries* §§ 42, 49 (1937); 3 AMERICAN LAW OF PROPERTY §12.112 (Casner ed. 1952); 9 C.J., *Boundaries* 206 (1916). See also Nashville v. Lawrence, 153 Tenn. 606, 284 S.W. 882 (1926); Vanderbilt Univ. v. Williams, 152 Tenn. 664, 280 S.W. 689 (1926); Reeves v. Allen, 101 Tenn. 412, 47 S.W. 495 (1898); Iron Mountain R.R. v. Bingham, 87 Tenn. 522, 11 S.W. 705 (1889).
53. 3 AMERICAN LAW OF PROPERTY § 12.112 n.10 (Casner ed. 1952).
54. See notes 52 and 53 *supra*.

owned the abandoned right of way as against the heirs and successors of the original grantors. The Court rejected a contention by the county, sustained by the trial court, that the railroad right of way had been dedicated to public use.

Covenants Running With The Land: The distinction between covenants which are merely personal between the parties to a particular deed and covenants which will be held to "run with the land" so as to be binding on future owners of the land is indeed a difficult one. In *Lowe v. Wilson*,[55] the question presented was whether the word "assigns" or other similar words must expressly appear in the deed in order for the covenant to be binding upon successors of the covenantor. The deed from the defendants to the plaintiffs contained a clause which provided that it was agreed between the parties thereto that no intoxicants should ever be sold upon the lot. Plaintiffs sought a declaratory judgment holding that the covenant was a personal agreement binding themselves only and not a limitation or cloud upon the title to their property. The Court, relying upon the 1916 case of *Carnegie Realty Co. v. Carolina, C. & O. Ry.*,[56] held in accordance with the second resolution in *Spencer's Case*[57] that "since the clause here did not specifically bind the heirs and assignees of the grantees . . . the covenant cannot be held to run with the land."[58] Neither the instant case nor Judge Green in the *Carnegie Realty* case cited or discussed *Doty v. Chattanooga Union Ry.*,[59] an 1899 Tennessee Supreme Court case nationally recognized as a leading case holding that a covenant is binding upon the assignee of the covenantor even though the railroad was not built ("not *in esse*") when the deed was made and even though the word "assignee" or its equivalent was not used.

Among the resolutions laid down in *Spencer's Case* was one which asserted the requirement that, even though the covenant "touch and concern" the land, yet if it concerns a thing which is not *in esse* at the time of the demise, but is to be built or created thereafter, the covenant will not bind the assigns unless they are expressly mentioned. A correlative resolution amplified this requirement by providing that, if the covenant extends to a thing *in esse*, then it shall bind the assigns without express words.[60] This arbitrary and artificial distinction between covenants relating to things *in esse* and those relating to things not *in esse* caused considerable litigation in cases involving covenants in leases.[61] But in the application of the resolutions in *Spencer's Case*

55. 250 S.W.2d 366 (Tenn. 1952).
56. 136 Tenn. 300, 306, 189 S.W. 371, 372 (1916).
57. 5 Co. Rep. 16a, 77 Eng. Rep. 72, 15 Eng. Rul. Cas. 233 (1584).
58. 250 S.W.2d at 368 (Tenn. 1952).
59. 103 Tenn. 564, 53 S.W. 944, 48 L.R.A. 160 (1899).
60. 14 AM. JUR., *Covenants, Conditions and Restrictions* §§ 21-23 (1938); 2 AMERICAN LAW OF PROPERTY § 9.10 (Casner ed. 1952).
61. See note 60 *supra*.

to covenants found in conveyances of a fee, most of the modern cases repudiate the distinction and hold that whether a covenant runs with the land is to be determined from the intention of the parties as disclosed by the entire instrument and not by the presence or absence of the technical word "assigns."[62] In looking at the language of the instrument, the presence or absence of the word "assigns" or its equivalent may have a strong influence on the court in determining the intentions of the parties.[63] But it is generally regarded as a mere rule of construction and not a rule of law. Insofar as the *Lowe* case and its 1916 precedent require the use of the word "assigns" or its express equivalent as a technical absolute, they would seem to tend toward an unfortunate retrogression.

II. Eminent Domain

Damages: The general rule is that a landowner's execution of a right of way deed or the condemnation of a right of way precludes a subsequent recovery for damage caused to the remaining land.[64] The theory is that the condemnation or deed embraces by implication all damages necessarily incident to effecting the purpose of the acquisition of the land. However, Tennessee cases in announcing the rule have recognized an exception where a subsequent loss or damage was not within the contemplation of the parties and, if advanced, would have been rejected as speculative and conjectural.[65] In two recent cases, landowners claimed to be within this exception despite the fact that both had executed right of way deeds expressly accepting payment in full for the right of way and all damages which might be done to their remaining land by the highway construction. In *Carter County v. Street*,[66] it appeared that the owner had no information when he executed the deed that cuts and fills would be such that slides would damage his remaining lands. In *Morgan County v. Neff*,[67] the owner was not shown a construction plan and did not know that the county's

62. Doty v. Chattanooga Union Ry., 103 Tenn. 564, 53 S.W. 944, 48 L.R.A. 160 (1899); Purvis v. Shuman, 273 Ill. 286, 112 N.E. 679, L.R.A.1917A. 121, Ann. Cas. 1918D 1175 (1916); Sexauer v. Wilson, 136 Iowa 357, 113 N.W. 941 (1907); 14 Am. Jur., *Covenants, Conditions and Restrictions* § 23 (1938) and authorities there cited; Clark, Covenants and Interests Running with Land 95 (2d ed. 1947); 5 Restatement, Property §§ 531, comment c, 554 (1944); Sims, *The Law of Real Covenants: Exceptions to the Restatement of the Subject By the American Law Institute*, 30 Corn. L.Q. 1, 30 (1944); Notes, 14 L.R.A. (n.s.) 185 (1908), L.R.A.1917A 127. *Contra:* Maryland & P.R.R. v. Silver, 110 Md. 510, 73 Atl. 297 (1909); Gulf, C. & S.F. Ry. v. Smith, 72 Tex. 122, 9 S.W. 865 (1888).

63. See cases cited in note 62 *supra.*

64. Central Realty Co. v. Chattanooga, 169 Tenn. 525, 89 S.W.2d 346 (1936); Hord v. Holston River R.R., 122 Tenn. 399, 123 S.W. 637 (1909); Fuller v. Chattanooga, 22 Tenn. App. 110, 118 S.W.2d 886 (E.S. 1938).

65. Hord v. Holston River R.R., 122 Tenn. 399, 123 S.W. 637 (1909); Fuller v. Chattanooga, 22 Tenn. App. 110, 118 S.W.2d 886 (E.S. 1938).

66. 252 S.W.2d 803 (Tenn. App. E.S. 1952).

67. 256 S.W.2d 61 (Tenn. App. E.S. 1952).

diversion of a stream would cut off her means of ingress and egress. The Eastern Section of the Court of Appeals held both situations to be within the execption to the general rule and allowed recovery of damages despite the limitations in the deeds.

The *Morgan County* case is difficult to harmonize with the weight of previous authority, since in it, unlike the *Carter County* case,[68] the subsequent damages were unforeseeable only to the owner who did not see the county's construction plan. Prior statements of the law on this proposition had indicated that the damages which may be recovered subsequent to a condemnation award or deed are those which *neither party* had reason to anticipate.[69] The statement of the rule in the *Morgan County* case may be traced directly to the leading case of *Hinckley v. City of Seattle*[70] in which the Supreme Court of Washington held that, although a condemnation award is a conclusive adjudication as to "all matters that were, should have been, might have been, or could have been raised in the condemnation proceeding," a loss which "neither party had any reason to anticipate, and the possibility of which, if suggested, would have been rejected as speculative and conjectural by the trial court, can now be compensated in damages."[71] A voluntary right of way deed has the effect of a condemnation award and covers all damages to which the landowner would have been entitled in a condemnation proceeding.[72] The damages in the *Morgan County* case were clearly not of the unanticipated and conjectural type referred to in the *Hinckley* case and decisions which have followed it. Assuming that construction plans were available to the landowner and that inspection would have shown no plans for bridging the channel, then this element of the damages would have been available for evaluation in a condemnation proceeding. It would seem clear that the county knew of these plans and may have bargained in reference to them. Insofar as the case held that recovery may be allowed for damages unforeseen only to the landowner, it would seem to be an extension of the rule in previous decisions.[73] The case more accurately seems to rest upon a species of fraud and concealment and in effect would seem to place a duty upon condemning authorities to apprise landowners of relevant details of planned highway construction before purchasing by right of way deed.

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68. "The slides . . . covered up to an acre and a half of plaintiff's adjoining land, their magnitude suggested that they were not anticipated by either party." Carter County v. Street, 252 S.W.2d 803, 807 (Tenn. App. E.S. 1952).

69. Jones v. Oman, 28 Tenn. App. 1, 7, 184 S.W.2d 568, 571 (M.S. 1944); Fuller v. Chattanooga, 22 Tenn. App. 110, 117, 118 S.W.2d 886, 891 (E.S. 1938); 18 AM. JUR., *Eminent Domain* § 369 (1938).

70. 74 Wash. 101, 132 Pac. 855 (1913).

71. 132 Pac. at 856.

72. Hord v. Holston R.R., 122 Tenn. 399, 123 S.W. 637 (1909).

73. *But cf.* Milhous v. State Highway Dept., 194 S.C. 33, 8 S.E.2d 852 (1940).

III. LANDLORD AND TENANT

Assignment and Sublease: The different legal consequences which attach to a transfer by the lessee, depending on whether it is characterized as an *assignment* or a *sublease,* were involved to some extent in two cases, one a federal eastern district case[74] and the other from the Middle Section of the Court of Appeals.[75] If the transfer is an *assignment,* then the transferee comes into privity of estate with the lessor so that each is liable to the other on the tenurial rights and duties running with the leasehold estate, and the lessee is not the landlord of the transferee. In this event, the original lessee no longer owes any tenurial duties to the lessor, although he may be liable to the lessor upon his contract. But if the transfer is a *sublease,* the original lessee becomes the landlord of his transferee, and there are no tenurial rights and duties between the original lessor and the transferee. In the latter event, liability from the transferee to the original lessor can only be predicated upon either the third-party beneficiary contract doctrine or on a statute.[76]

To constitute an *assignment* of a lease as distinguished from a *sublease,* the lessee must transfer his right to possession for the entire duration of his term. While there is a split of authority on it elsewhere[77] there is one statement of the Eastern Section of the Court of Appeals, quoting a Texas case, that to constitute an assignment the transfer by the lessee must leave "no reversionary interest in the grantor."[78] Under this rule, the reservation by the lessee-transferror of a right of entry for failure of the transferee to pay the rent or any other failure would make the transaction a sublease and not an assignment.

Because covenants in restraint of alienation, insofar as they are allowed at all, are strictly construed, the distinction between *assignment* and *sublease* becomes all the more important. Thus, a covenant not to "assign" does not prevent the lessee from subleasing;[79] a covenant not to "sublease" is not broken by an assignment;[80] and a provision

74. Campbell v. American Limestone Co., 109 F. Supp. 741 (E.D. Tenn. 1951) (opinion published in 1953).

75. Tennessee Handle Co. v. Builders Supply Co., 255 S.W.2d 412 (Tenn. App. M.S. 1952).

76. Brummitt Tire Co. v. Sinclair Refining Co., 18 Tenn. App. 270, 75 S.W.2d 1022 (E.S. 1934); Commercial Club v. Epperson, 15 Tenn. App. 649 (M.S. 1932); 32 AM. JUR., *Landlord and Tenant* §§ 314-426 (1941); 1 AMERICAN LAW OF PROPERTY §§ 3.57, 3.61, 3.62 (Casner ed. 1952); 52 C.J.S., *Landlord and Tenant* §§528, 529 (1947); 4 THOMPSON, REAL PROPERTY § 1693 (Perm. ed. 1940); 1 TIFFANY, REAL PROPERTY § 124 (3d ed., Jones, 1939).

77. See 1 AMERICAN LAW OF PROPERTY § 3.57 (Casner ed. 1952) and authorities there cited.

78. Brummitt Tire Co. v. Sinclair Refining Co., 18 Tenn. App. 270, 75 S.W.2d 1022 (E.S. 1934).

79. Gilbert v. Williams, 307 Ky. 638, 211 S.W.2d 829 (1948); see Note, 74 A.L.R. 1018 (1931).

80. Cases are collected in Notes, 7 A.L.R. 249 (1920), 79 A.L.R. 1374 (1932).

against subleasing the premises is not broken by a sublease of a part of the property.[81] In *Tennessee Handle Co. v. Builders Supply Co.*,[82] the Middle Section of the Court of Appeals approved the findings and conclusions of the chancellor in a case which from the opinion would seem to have involved these technical distinctions, although it does not appear that they were called to the Court's attention.

The Holdover Tenant: It is well settled that the tenant who holds over beyond the duration of his term may be evicted as a trespasser or treated as a holdover at the landlord's election. But for what term may the landlord elect to hold the tenant? In *Campbell v. American Limestone Co.*,[83] a tenant who held over after the expiration of a lease for one year was held for another one year term. The federal eastern district court followed the rule as announced by some Tennessee cases that "the tenant holding over is held strictly, at the election of the landlord, to liability to another like term."[84] Although the question apparently has not arisen in Tennessee, a literal application of the rule as stated would mean that a tenant for a longer term than one year could also be held to another like term. It is doubtful if any court would so hold.[85] The majority of American courts hold that the holdover period is determined by the term of the prior lease *up to a maximum of one year,* and those courts which disagree generally say that the period depends upon the way the rent is reserved in the prior lease.[86]

Rent Control: Marino v. O'Byrns[87] involved a tenant's suit against a landlord under the Federal Housing and Rent Act to recover alleged overcharges. The premises were unfurnished and under rent control when purchased by the defendant during the War. By virtue of owner occupancy, the property was decontrolled under the act of 1947, as amended in 1948. Defendant made substantial improvements during his occupancy and in 1948 rented the apartment furnished to the plaintiff at a higher rental than its ceiling under the 1942 Act. The property was recontrolled under the 1949 Act, but the landlord did not petition the rent director for approval of the raise in rent. The

81. 1 AMERICAN LAW OF PROPERTY § 3.58 (Casner ed. 1952) and authorities there cited.
82. 255 S.W.2d 412 (Tenn. App. M.S. 1952).
83. 109 F. Supp. 741 (E.D. Tenn. 1951) (opinion published in 1953).
84. Lewis v. Bringhurst Reid Co., 155 Tenn. 177, 290 S.W. 972 (1927); Hammond v. Dean, 67 Tenn. 193 (1874); Brinkley v. Walcott, 57 Tenn. 22 (1872).
85. See, *e.g.*, Sinclair Refining Co. v. Shakespeare, 115 Colo. 520, 175 P.2d 389 (1946); Murrill v. Palmer, 164 N.C. 50, 80 S.E. 55 (1913); Parker v. Page, 41 Ore. 579, 69 Pac. 822 (1902). *But cf.* Weber v. C & C Dry Goods Co., 253 Ky. 439, 69 S.W.2d 731 (1934); Feldman v. Sheridan Warehouse Co-op Corp., 247 App. Div. 82, 285 N.Y. Supp. 1033 (4th Dep't 1936).
86. 32 AM. JUR., *Landlord and Tenant* § 940 (1941); 1 AMERICAN LAW OF PROPERTY § 335 (Casner ed. 1952); see cases collected in Note, 108 A.L.R. 1464 (1937).
87. 255 S.W.2d 720 (Tenn. App. W.S. 1952).

defendant insisted that the first rent charged after a substantial improvement is the lawful one until changed by the director. Although recognizing that several state court and lower federal court decisions supported the defendant's view,[88] the Western Section of the Tennessee Court of Appeals followed a decision of the Federal Court of Appeals for the First Circuit[89] and held that upon recontrol in 1949 the apartment was relegated to its previous controlled status and the landlord could not decontrol it by improvements. Therefore, the ceiling could be increased only by order of the rent director.

88. De Antueno v. Agostini, 94 F. Supp. 957 (S.D.N.Y. 1951); Tomazich v. Padis, 72 Idaho 77, 237 P.2d 1071 (1951); Lyon v. Thompson, 199 Misc. 527, 99 N.Y.S.2d 922 (Sup. Ct. 1950).

89. Forde v. U.S., 189 F.2d 727 (1st Cir. 1951).