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Real Property -- 1954 Tennessee Survey

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REAL PROPERTY—1954 TENNESSEE SURVEY

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DEEDS AND TITLES

Champertous Deeds and Adverse Possession: There were two cases, *Robinson v. Harris*[1] and *State v. McNabb*,[2] which used the questionable champertous deed concept to reach what seem to be just results. The sixteenth century doctrine, enacted by statute[3] in Tennessee, 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 void.[4] As pointed out in the 1953 Survey article,[5] however, recent Tennessee cases have tended to ignore a line of nationally recognized Tennessee equity cases holding that the deed is not void; 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.[6] Thus, in equity the deed is "void" only in the sense that it can have no effect upon whatever rights may have been acquired by the adverse holding of the one in actual physical possession of the land.

This raises the question whether there is to be a different rule of substantive law applied when an equity remedy is used. Also, since the cases during the last two years have been decisions of the Court of Appeals, in which certiorari was denied by the Supreme Court, a question is raised as to whether the conflicting principle established by the Tennessee Supreme Court in the equity cases is still valid and effective.

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1. 260 S.W.2d 404 (Tenn. App. W.S. 1952).
2. 267 S.W.2d 109 (Tenn. App. M.S. 1953).
3. TENN. CODE ANN. §§ 7823-7824 (Williams 1934).
4. 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 (1903); Bullard v. Copps, 21 Tenn. 408, 37 Am. Dec. 561 (1841).
5. Trautman, *Real Property—1953 Tennessee Survey,* 6 VAND. L. REV. 1080-87 (1953).
6. See *e.g.* Young v. Unknown Heirs of Little, 34 Tenn. App. 39, 232 S.W.2d 614 (E.S. 1949), 249 S.W.2d (Tenn. App. E.S. 1952); Frumin v. May, 251 S.W.2d 314 (Tenn. App. E.S. 1952). Kitchen-Miller Co. v. Kerney, 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 (1903), used strong language in each case emphasizing that the deed was champertous and "utterly void" without mentioning such earlier Tennessee equity cases as, Key v. Snow, 90 Tenn. 663, 669, 185 S.W. 251 (1891); Wilson & Wheeler v. Nance & Collins, 30 Tenn. 188 (1850); Nance's Lessee v. Thompson, 33 Tenn. 320, 327 (1853); Ruffin v. Johnson, 52 Tenn. 604 (1871); 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). See also PATTON, TITLES § 121 (1938); 6 THOMPSON, REAL PROPERTY § 3043 (Perm ed. 1940); 5 TIFFANY, REAL PROPERTY § 1331, (3rd ed., Jones, 1939).

The legal disability to execute a deed and convey whatever ownership rights in land the record owner may have, which is implicit in the champertous deed concept, has been repudiated in all states except Kentucky, Connecticut, and Tennessee.[7] Because it is believed that the only point intended is that such a deed shall have no effect upon whatever rights may have been acquired by the adverse possessor, and because a difference between equity and law remedies can only provide an unnecessary procedural trap for the unwary, it may not be amiss to suggest that the "champerty" statute[8] should be repealed and the rule of the Tennessee equity cases approved.[9]

It was stated above that what seem to be just results were achieved in the two decisions reported this year. *Robinson v. Harris*[10] was a case in which Martha Harris, a "wholly illiterate old negress," purchased the land in question under contract in 1925 from Sims. Martha took possession immediately, built a fence around it so as to enclose it with her home place, cleared and cultivated it, and remained constantly in possession. In 1926 Sims executed a mortgage deed of trust on a large tract which included the land purchased by Martha. In 1928 Sims executed a deed of conveyance to Martha which purported to convey the fee simple. This deed was apparently registered. The mortgage deed was foreclosed in 1929 and the land described in it was conveyed to plaintiff's predecessors in title, who sought to treat Martha as a tenant and brought suit in 1930 in the justice of the peace court to collect rent from her. The present action is an ejectment suit against Martha. The controversy between 1930 and the present action is a study in confusion; during this period Martha was represented by three or four different attorneys in several different actions concerning the facts set forth above. She obtained a preliminary injunction in 1930 against plaintiff's predecessor in title enjoining him from "molesting" her in reference to the land. This was issued upon condition that Martha confess judgment in the action against her in the justice of the peace court. But the injunction suit was never tried on the merits, and in 1949 it was dismissed for lack of prosecution. Because of the injunction for the nineteen years against plaintiff's predecessor in title, it was held that Martha's defense of title by adverse possession was not good. Because it was felt that justice required a decision for Martha, the Western Section of the Court of Appeals on its own initiative used the champertous deed concept to hold that the deed to plaintiffs conferred no title whatsoever and that therefore they could not maintain the suit in ejectment. While the decision for Martha

7. See note 5 *supra;* 3 AMERICAN LAW OF PROPERTY § 12.69 (Casner ed. 1952); PATTON, TITLES § 121 (1938); 35 L.R.A. (N.S.) 759-66 (1912).
8. See note 3 *supra.*
9. Ruffin v. Johnson, 52 Tenn. 604 (1871); Ferguson v. Prince, 136 Tenn. 543, 190 S.W. 548 (1916); and cases cited in note 6 *supra.*
10. *Supra* note 1.

seems just, it is believed that the use of the champertous deed concept was unnecessary and that it is dangerous insofar as that doctrine compels the conclusion that there is a complete lack of legal capacity on the part of a true owner to transfer whatever rights he may have in land, which unknown to him might have been invaded by an adverse possessor.

It would seem that Martha was the equitable owner of the land in question as a result of the contract of 1925, and that Sims owned the legal title. While it is true that Martha's equity could have been cut off by a bona fide purchaser for the value without notice,[11] Martha's physical possession of the land in question was sufficient notice to the 1926 mortgagee, to the purchasers at the foreclosure sale, and to the plaintiffs, to prevent them from being without notice. Thus the deed to plaintiffs' predecessor would not cut off Martha's equity;[12] and the 1928 deed to Martha accordingly perfected her legal title.

In *State v. McNabb*[13] the Middle Section of the Court of Appeals held that where a person holds the adverse possession of a smaller tract within the boundaries of a larger one, a sale and conveyance by the record title holder of the larger tract without excluding the smaller one, is champertous only to the extent of the smaller tract actually possessed; and the conveyance is valid as to the remaining portion of the larger tract. This is a sensible limitation on the champertous deed concept.[14]

In *Suddath v. Beaty*[15] the Middle Section of the Court of Appeals held (a) that the plaintiff failed to prove that there was ever a grant from the State of Tennessee or the State of North Carolina as required by Section 8582 of the Code—the seven year statute of limitation; and (b) the plaintiff also failed to prove that he and his predecessors in title had adverse possession for as long as twenty years. Therefore a judgment of dismissal was affirmed.

This was an action in ejectment filed in chancery. After alleging ownership and the right to possession, the bill prayed that title and possession be decreed in the plaintiff and also that the decree enjoin further prosecution by the defendants of a law action for unlawful detainer against a tenant of the plaintiff. The plaintiff felt compelled to confess judgment in the unlawful detainer action.

In Tennessee there are at least three distinct theories under which

11. 3 AMERICAN LAW OF PROPERTY §§ 11.40, 17.1-17.3 (Casner ed. 1952).
12. Lea v. Polk County Copper Co., 62 U.S. 493, 16 L. Ed. 203 (U.S. 1858); Jarman v. Farley, 75 Tenn. 141 (1881); Nikas v. United Const. Co., 34 Tenn. App. 435, 239 S.W.2d 41 (W.S. 1950).
13. *Supra* note 2.
14. See Trautman, *supra* note 5 at 1082; *cf.* Kitchen-Miller Co. v. Kern, 170 Tenn. 10, 91 S.W.2d 291 (1936); Green v. Cumberland Coal & Coke Co., 110 Tenn. 35, 72 S.W. 459 (1903).
15. 267 S.W.2d 112 (Tenn. App. M.S. 1954).

title may be acquired by the adverse possession of land.[16] Two of these are purely statutory; the third is an adaptation by the Tennessee courts of the common law rule of prescription—applicable at common law only to non-possessory rights such as easements—to the acquisition of title to possessory interests.

First, Sections 8582 and 8583 of the Code[17] provide for the acquisition of title by seven years' adverse possession under recorded color of title purporting to convey a fee simple. By its terms the statute applies only to land originally granted by the State of Tennessee or the State of North Carolina. As the instant case demonstrates, the fact of a state grant of the land needs to be expressly proved under this theory.[18] It is not necessary, however, to trace the adverse possessor's claim of title to the original grantee from the state.[19] We are informed that there is land in Tennessee which was not granted originally by either state. After the color of title has been of record for 30 years, Sections 8586 and 8587 of the Code[20] make the title indefeasible and not affected by disabilities of the record owner, or his successor in interest.

Secondly, if the adverse claimant does not hold under a recorded color of title, Section 8584 of the Code is construed to provide him a defensive possessory right to the land upon proof of seven years' adverse possession.[21] While the right so acquired will not support an action of ejectment by the adverse claimant,[22] it apparently will constitute a defense to an action of ejectment by the record title holder.[23] If the adverse possession continues on for the total period of twenty years, the adverse claimant will gain a full legal title by the third theory—the common law presumption of a grant.

Thirdly, the courts of Tennessee, independently of the statutory limitations, and by analogy to the doctrine of prescription, have held that where one has remained in continuous adverse possession of the land for twenty years, a grant or deed will be presumed.[24]

16. See Note, *Title by Adverse Possession in Tennessee*, 5 VAND. L. REV. 621 (1952) for cases supporting each theory.

17. TENN. CODE ANN. §§ 8582, 8583 (Williams 1934).

18. See also Cannon v. Phillips, 34 Tenn. 211 (1854); *cf.* Note, 5 VAND. L. REV. 621, 624 (1952); "This grant could be proved as a fact, or it could be proved by a presumption of law based upon continuous and uninterrupted possession for a period of twenty years. It seems that this requirement is obsolete today."

19. Cannon v. Phillips, *supra* note 18.

20. TENN. CODE ANN. §§ 8586, 8587 (Williams 1934).

21. Ferrell v. Ferrell, 60 Tenn. 329, 334 (1872); Kittel v. Steger, 121 Tenn. 400, 117 S.W. 500 (1908); Moffitt v. Meeks, 29 Tenn. App. 609, 199 S.W.2d 463 (M.S. 1946); Peoples v. Hagaman, 31 Tenn. App. 398, 215 S.W.2d 827 (E.S. 1948); Menefee v. Davidson County, 195 Tenn. 547, 260 S.W.2d 283 (1953).

22. Brier Hill Collieries v. Gunt, 131 Tenn. 542, 175 S.W. 560 (1914); Hubbard v. Godfrey, 100 Tenn. 150, 47 S.W. 81 (1898); King v. Coleman, 98 Tenn. 561, 566, 40 S.W. 1082 (1897); Crutsinger v. Catron, 29 Tenn. 24 (1848); Campbell v. Campbell, 40 Tenn. 325 (1859).

23. Kittel v. Steger, 121 Tenn. 400, 117 S.W. 500 (1908); Peoples v. Hagaman, *supra* note 21; *cf.* Erck v. Church, 87 Tenn. 575, 11 S.W. 794, 4 L.R.A. 641 (1889).

24. Ferguson v. Prince, 136 Tenn. 543, 190 S.W. 548 (1916); Williams v.

In the instant case no mention was made of the assertion of the second theory above—the defensive possessory right to land upon a showing of seven years' adverse possession without color of title. While this theory will not be regarded as sufficient to maintain ejectment, it is said to be sufficient to protect the adverse claimant's interest in such actions as forcible entry and detainer, trespass and in some cases by injunction.[25]

Menefee v. Davidson County[26] demonstrates one of the ways in which the defensive possessory right acquired under the second theory above may be lost. The plaintiff county and the defendant operate rock quarries on adjoining tracts of land. The defendant placed a rock crusher, scales, office and other facilities on the county's property and also used it for right-of-way purposes. This situation existed from 1932 until the filing of the instant suit in 1952. While the chancellor held that rights could not be acquired by adverse possession because the property was held and used by the county in its governmental capacity, the Supreme Court affirmed on other grounds. In March, 1952 the county attorney had written to the defendant requesting him to remove the facilities within thirty days. The defendant replied to this letter stating that he would gladly comply with the wishes of the county, but requested a postponement of the removal. This the county refused. The Supreme Court held that defendant's letter was an admission that he was occupying the land permissively rather than adversely; that Section 8584 of the Code bars the remedy, not the right; and that defendant's letter amounted to a waiver of his defense under Section 8584.

In both *Robinson v. Harris* and *Suddath v. Beaty* there was a bill in ejectment which sought among other things to enjoin a law action by the defendants for rent and for unlawful detainer. In each instance the complainant in equity felt compelled to confess judgment in the law action as a prerequisite to equitable relief. This seems to be an unnatural formality which requires the plaintiff in equity to "confess" at law the very substance of that which he denies in equity. It caused considerable embarrassment in the *Harris* case where a preliminary injunction had issued in equity, but because of the confusion and illiteracy of the equity complainant the case was never tried on the merits, and ultimately was dismissed for lack of prosecution. The Western Section of the Court of Appeals was hard put to escape the confessed judgment in the law action and it performed magic on its own motion to accomplish justice.

The requirement that in order to obtain injunctive relief against

Donell, 39 Tenn. 695 (1859); Cannon v. Phillips, 34 Tenn. 211 (1854).

25. Note, 5 VAND. L. REV. 621, 626 (1952), citing Liberto v. Steele, 188 Tenn. 529, 221 S.W.2d 701 (1949).

26. 195 Tenn. 547, 260 S.W.2d 283 (1953).

further proceedings in a law action the equity plaintiff must confess judgment in the law action seems to have been originally suggested in Tennessee by Mr. Gibson in his work, *Suits In Chancery*.[27] The rule is premised on the belief that otherwise the plaintiff may litigate in chancery and then dismiss his bill and renew the litigation as a defendant in the law action. Mr. High, who is critical of the rule, states that the principle of the rule is the feeling that whenever a person resorts to equity for substantive relief against a claim asserted at law, he must submit himself entirely and without reserve to the jurisdiction of the chancellor.[28] He says:

> "The rule, however, if rule it may be called, is by no means inflexible; and where one has a distinct ground of equitable relief aside from his defense at law, he is not obliged to abandon his legal defense by confessing judgment before proceeding in equity to enjoin the suit at law."[29]

The doctrine of res adjudicata should prevent a party from litigating the same issues a second time. The difficulty, however, seems to come from the belief that a plaintiff in equity may take a voluntary dismissal without prejudice at any time before a decree is rendered.[30] The statute[31] is not explicit about the latest time for allowing a voluntary non-suit by the plaintiff, but even Mr. Gibson agrees that where proof has been taken, and the plaintiff becomes unwilling to have the case decided in chancery on the proof taken, "he should not be allowed to dismiss his bill without prejudice."[32] He says:

> "In such case the complainant may . . . dismiss his bill, but such dismissal must be subject to all the consequences incident to a dismissal with prejudice."[33]

A dismissal with prejudice would seem to constitute a bar to further proceedings in the law action on principles of res adjudicata; and clearly the doctrine of res adjudicata is a bar to such proceedings if the chancery court decides the case on the merits.[34] It seems therefore that the confession of judgment in the law action is productive of no benefit which cannot and should not be obtained on principles of res adjudicata. Therefore, it ought not to be a mechanical requirement in every case where a plaintiff in equity seeks to enjoin further pro-

27. See GIBSON, SUITS IN CHANCERY § 814 (4th ed., Higgins & Crownover, 1937) and cases cited in footnote 34a which in turn cite earlier editions of Mr. Gibson's treatise.
28. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS 73 (4th ed. 1905).
29. *Ibid.*
30. GIBSON, *op. cit. supra* note 27, at 441.
31. TENN. CODE ANN. § 9093 (Williams 1934).
32. GIBSON, *op. cit. supra* note 27, at 486.
33. *Ibid.* See also Smith v. McConnell, 156 Tenn. 523, 525, 3 S.W.2d 161 (1927); Lyle v. DeBord, 185 Tenn. 380, 206 S.W.2d 392 (1947).
34. Haynes v. Bank, 106 Tenn. 425 (1901).

ceedings in a law action. Perhaps some amendment of Code Section 9093 is needed in regard to the terms and conditions upon which an equity plaintiff may be allowed to take a voluntary dismissal. It would seem that dismissal as a matter of right should be allowed at any time before proof is taken; after that, the chancellor's discretion should control the terms and conditions of a voluntary dismissal. In any event, however, a court of chancery certainly ought to be able to accomplish justice in such cases without going through the unrealistic procedure of making an equity plaintiff confess that which he actually denies.

Boundaries: Effect of Changes in River Course. The vagaries of the troublesome Mississippi River again[35] produced a controversy as to boundary lines in *Russell v. Brown.*[36] In 1913, one Armistead held four tracts of land all bordering on the eastern bank of the river. An avulsion of the river in that year suddenly caused the river's channel to move to the east. Armistead later conveyed all his title in the lands to the Russell group who in turn conveyed in 1949 by warranty deed to Brown. The latter deed described the property as approximately 1,646 acres and referred to the descriptions in the four deeds by which Armistead had originally acquired title. The description was followed by a provision which excepted from the grant any property lost by "relictions" but including any property gained by "accretions," the grantors' expressed intent being to convey all land "contiguous" to that described and owned by them.

However, by 1953, accretions to the land west of the river had created a tract of 2,195 acres on that bank and the grantors sought a judgment that Brown had received only the acreage east of the river. The Supreme Court held that Brown acquired all lands owned by the Russell group, and Armistead before them, on both sides of the river. The court concluded that after the avulsion of 1913 Armistead and his successors owned the river's bed[37] and the land on both sides of it. The exception of "relictions" was ineffective to exclude the western bank, and the conveyance of all "contiguous" land included both sides and the river's bed.

35. The most notable of the earlier cases is Arkansas v. Tennessee, 246 U.S. 158, 38 Sup. Ct. 301, 62 L. Ed. 638 (1918), in which the two states argued the effect of an 1876 avulsion of the river on their boundary line. For the decisions which led to this controversy, see State v. Muncie Pulp Co., 119 Tenn. 47, 104 S.W. 437 (1907); Stockley v. Cissna, 119 Tenn. 135, 104 S.W. 792 (1907); Stockley v. Cissna, 119 Fed. 812 (6th Cir. 1902). A similar change of river course in 1832 led to the conflicts in Laxon v. State, 126 Tenn. 302, 148 S.W. 1059 (1912) (criminal jurisdiction over an island) and Moss v. Gibbs, 57 Tenn. 283 (1872) (conflicting Tennessee and North Carolina grants of the same island).

36. 195 Tenn. 482, 260 S.W.2d 257 (1953).

37. Subject to the easement of navigation in the public. State v. Muncie Pulp Co., 119 Tenn. 47, 104 S.W. 437 (1907).

It is well established in Tennessee that title to the bed of navigable[38] streams is in the state and, therefore, grants of land lying upon such streams extend only to the low water mark.[39] Therefore, prior to the 1913 avulsion of the Mississippi, Armistead owned only to the eastern bank of the river.[40] However, it is universally held that a sudden change of river course by avulsion does not affect boundary lines.[41] Therefore, after 1913 Armistead owned land on the western bank to the edge of the old stream bed. Although the *Russell* case does not discuss the rights of the state in such lands, it seems that after the avulsion the state could have asserted its rights of ownership in the old stream bed as it did in the notable case of *State v. Muncie Pulp Co.*[42] Whether the old channel was included in the acreage involved here does not appear from the opinion.

Since the avulsion caused Armistead to own land west of the new river bed, it is equally clear that all subsequent accretions to that land became his property. When nature causes a gradual shift in the course of a stream, whether by recession of the water (reliction), or by the deposit of new soil on the margin of the abutting land (accretion), the boundary between the land and the water changes so that the owner of the land adjacent to the stream acquires title to the newly emerged land and it is lost to the owner of the water bed.[43]

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38. There is an important distinction between navigability in law and navigability in fact. If the stream is merely navigable in fact, rather than in law, the state does not own the river bed. See State v. West Tennessee Land Co., 127 Tenn. 575, 158 S.W. 746 (1913) (Reelfoot Lake Case). Reelfoot Lake was held to be navigable in law and, therefore neither its waters nor the land under them were susceptible of private ownership. The state holds such property in trust for all the people and cannot grant it away.

39. State v. Muncie Pulp Co., 119 Tenn. 47, 104 S.W. 437 (1907); Goodwin v. Thompson 83 Tenn. 209 (1885); Posey v. James, 75 Tenn. 98 (1881); Martin v. Nance, 40 Tenn. 649 (1859); Stuart v. Clark's Lessee, 32 Tenn. 9 (1852); Cunningham v. Prevow, 28 Tenn. App. 643, 192 S.W.2d 338 (W.S. 1945).

40. Although it was unnecessary to deal with the point, the Court apparently considered that Armistead owned to the center of the original channel of the river and quoted language from Nebraska v. Iowa, 143 U.S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186 (1892) to this effect. However, that case involved the line of jurisdiction between two states in which case the center of the navigable channel, or *thalweg,* is the state line. Arkansas v. Tennessee, 246 U.S. 158, 38 Sup. Ct. 301, 62 L. Ed. 638 (1918). *But see* McClure v. Couch, 182 Tenn. 563, 188 S.W.2d 550 (1945), which involved the effect upon private boundaries of an avulsion of Duck River. Here navigability was not discussed and the court relied upon the same language from Nebraska v. Iowa, *supra.*

41. 3 AMERICAN LAW OF PROPERTY 855 (Casner ed. 1952).

42. 119 Tenn. 47, 104 S.W.2d 437 (1907). Here the state asserted its rights in land which had been under the Mississippi River prior to the avulsion of 1876. It was held that such land belonged to the state and that whenever it is rendered unsuitable for navigation by a sudden change in river course it may be taken in possession and disposed of by the state as her authorities may see fit.

43. 3 AMERICAN LAW OF PROPERTY 856 (Casner ed. 1952); McClure v. Couch, 182 Tenn. 563, 188 S.W.2d 550 (1945). Compare Keel v. Sutton, 142 Tenn. 341, 219 S.W. 351 (1919) and Cunningham v. Prevow, 28 Tenn. App. 643, 192 S.W.2d 338 (W.S. 1945) as to rights in land which is lost by erosion or reliction and later reappears by accretion.

After applying these well established rules, the *Russell* opinion handles some routine problems in construction of deeds. The phrase "contiguous" was construed to include those lands "meeting so as to touch; bordering upon each other; not separate"[44] and, therefore, included the acreage on both sides of the river since, after the avulsion, Armistead had owned both banks and also the river bed. This construction was aided by the expression of intent in the Russell deed to convey all the land owned by the grantors in the general location of the described property. The exception of any "relictions" was ineffective because in a warranty deed this is a logical protective device. "Reliction" refers to land which has been covered by a stream but which has become uncovered by a gradual and imperceptible recession of the water. Such a gradual change in river course like that caused by accretion, changes boundary lines[45] and any relictions possibly could have belonged to someone other than the grantors. In view of the intent of the instrument as a whole it is likely that the scrivener contemplated excepting from the warranty deed any lands which possibly had belonged to Armistead or the Brown group and had subsequently been lost by reliction. Although title may be gained by reliction (by the owner of the bank at the expense of the owner of the water bed), the exception was only of property "lost by reliction."

Caveat Emptor v. Implied Warranty of Fitness For Purpose: The doctrine of *caveat emptor* in regard to title, quality and fitness for purpose has been largely abolished with respect to sales of personal property.[46] In real estate transactions the courts have implied a warranty of good and marketable title in contracts to sell, absent any provision in the contract indicating the specific character of the title to be transferred.[47] Two cases[48] decided during the year, however, raise in sharp focus the question of how long it will be before the doctrine of implied warranty of quality and fitness for purpose, as provided in the Uniform Sales Act, will be extended to sales of new dwelling houses by the land developer-contractor, who combines into one package the subdividing of the land, the architecture, design, and construction of the finished house, and its marketing.

In *Dozier v. Hawthorne Development Co.*[49] the plaintiff purchased

44. This is Dr. Johnson's definition of "contiguous" which was accepted in Spillers, Ltd. v. Cardiff Assessment Committee, [1931] 2 K. B. 21, 42.
45. 3 AMERICAN LAW OF PROPERTY 855 (Casner ed. 1952).
46. UNIFORM SALES ACT §§ 13-16; TENN. CODE ANN. §§ 7206-7209 (Williams 1934); 4 WILLISTON, CONTRACTS § 926 (1936).
47. 55 AM. JUR., *Vendor and Purchaser* § 149 (1946); 3 AMERICAN LAW OF PROPERTY § 11.47 (Casner ed. 1952).
48. Dozier v. Hawthorne Development Co., 262 S.W.2d 705 (Tenn. App. M.S. 1953); Evens v. Young, 264 S.W.2d 577 (Tenn. 1954).
49. 262 S.W.2d 705 (Tenn. App. M.S. 1953).

a new house while it was in the process of being constructed with other houses on a new subdivision of land. The plaintiff testified: "I looked at it, I liked it, and I bought it."[50] A contract form was therefore signed. Upon completion of the house a deed was executed pursuant to planned financing and the plaintiff moved in. Within four months it became apparent that the sewage disposal was inadequate because of the "poor porosity" of the soil leading from the septic tank, so that the overflow welled up in the yard. It appears that the land developer-contractor was advised by the Sanitary Engineer of the county that the land was of poor porosity before he acquired it. The defendant company was organized, however, and the land acquired for subdivision purposes. The first subdivision plan was rejected by the County Zoning and Planning Commission upon recommendation of the Sanitary Engineer. But a second plan with larger lots was partially approved, and this approval included the lot in question. The chancellor did not find that there was a misrepresentation of facts. In an action to rescind the sale and conveyance the chancellor held for the plaintiff on the ground of fraudulent concealment in that, because of his prior knowledge of the poor porosity of the soil, the president of the defendant company should have known that the septic tanks in this area would likely give trouble unless bolstered by proper drainage fields. The Middle Section of the Court of Appeals reversed because of the doctrine of *caveat emptor* and the fact that the Sanitary Engineer had given approval to the lot in question.

In *Evens v. Young*[51] the defendant was architect, contractor, and vendor of the dwelling house. He installed a gas water heater in a small closet beneath a stairway. It was alleged that an explosion and fire resulted from the accumulation of gas and the lack of oxygen in the enclosed space, causing damage to the plaintiffs. These were actions to recover for alleged negligence. The circuit court sustained demurrers to the actions and the Supreme Court affirmed on the theory of *caveat emptor*—let the buyer beware! The court refused to apply to vendors of houses the doctrine of *MacPherson v. Buick Motor Co.*,[52] which concerns the duty of manufacturers and vendors of chattels to persons harmed by faulty construction. Instead the court affirmed the severe doctrine of *Smith v. Tucker*[53] which held that a vendor owes no duty to a purchaser to disclose a dangerous condition of a dwelling, so therefore there is no basis for negligence.

50. *Id.* at 708.
51. 264 S.W.2d 577 (Tenn. 1954).
52. 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916 F 696, Ann. Cas. 1916 C 440 (1916).
53. 151 Tenn. 347, 270 S.W. 66, 41 A.L.R. 830 (1924). In this somewhat shocking decision the purchaser had occupied a newly constructed house for only a week or two when it was found that the heavy stone slab mantle was in an unsafe condition. The vendor-contractor was notified and he agreed to repair it. He then reassured the purchasers that the mantle was firm and

In considering the relation between the vendor and the purchaser of a dwelling house it would seem that three types of transactions should be distinguished. First there is the sale of the second hand house. Here the seller is often an individual owner who is clearly not a merchant or a specially skilled seller, so that a buyer is not entitled to rely on the seller's special skill or judgment. Also, such a house may be knowingly purchased in a run-down, defective condition. The Uniform Sales Act rule of implied warranty would seem to impose no warranties in this situation.[54]

Secondly, there is the contract to construct a house on the home owner's lot according to his own plans and specifications. There is no sale of real estate by the house builder, and the rule of *caveat emptor* would seem to have no application. It has always been clear that a construction contract as distinguished from a sales contract carries with it a promise to perform in a workmanlike manner.[55]

Thirdly, there is this recent development in house marketing in which the land developer-builder combines into one package the acquisition and subdivision of the land, the installation of roads, sewers, water, gas and electrical facilities, the architecture and design of the dwellings, the selection of the quality and character of the building materials and equipment, the employment of labor and the construction of the finished house equipped with refrigerator, kitchen stove, water heater and other appliances. Construction financing, consumer financing, title assurance and casualty insurance are frequently carried on as auxiliary businesses. This situation certainly seems to be a parallel to the manufacture and sales of items of personal property in which the warranty of quality and fitness for purpose is implied by the law under the Sales Act.

"perfectly all right." Very shortly thereafter the mantle fell on the purchaser's two year old child and killed it. In applying the *caveat emptor* rule the court seems to go so far as to say that "even proof of actual knowledge on the part of the defendant of defects in the house would not have rendered him liable." Ropeke v. Palmer, 6 Tenn. App. 348, 353-354 (W.S. 1927).

Cf. the penetrating socio-legal analysis by Justice Traynor in his concurring opinion in Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. 2d 453, 150 P. 2d 436, 440 (1944). He asserts that *negligence* should no longer be the sole and exclusive basis for liability against the manufacturer; that it is to the public interest to discourage the marketing of products having defects that are a menace to the public; and that consumer protection requires that the manufacturer, who can anticipate some hazards and guard against the recurrence of others, assume liability without proof of fault, and distribute the cost of insuring or guarding against such injuries among the public as a cost of doing business.

54. Tenn. Code Ann. § 7208 (Williams 1934). If the sale is made through a skilled agent, however, his skill and judgment may be attributed to the seller.

55. Miller v. Cannon Hill Estates, Ltd., [1931] 2 K. B. 113; Lawrence v. Cassel [1930] 2 K. B. 83; 9 Am. Jur., *Building and Construction Contracts* § 10 (1937); Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, 37 MINN. L. REV. 108, 111 (1953) fn. citing HUDSON, BUILDING CONTRACTS 186 (7th ed. 1946).

While American case law[56] is sparse on this point, there are at least two English cases[57] which clearly hold that where a purchaser makes a contract to purchase a house in the process of being constructed, there is a warranty implied by law that the materials used will be suitable and fit, that the house will be completed in an efficient and workmanlike manner, and that the dwelling will be fit for human habitation. In both cases the plaintiff asked for and received the contract measure of damages; and liability was imposed upon the subdivision-developer simply upon proof of a contract to sell a newly constructed dwelling house, independently of whether or not there was an express warranty.

No doubt the doctrine of *caveat emptor* made good sense in a feudal society where animals and agricultural lands were traded among neighbors of relatively equal experience. It hardly seems to fit in a twentieth century Tennessee where rapid commercial transactions and the interdependency of peoples are so much a part of the way of life that implied warranties of quality and fitness for purpose are imposed upon the sales of food, medicine, transportation vehicles, and almost every other necessity except housing.

Because of the lack of adequate State standards and control in this area, the housing agencies of the Federal Government have set minimum standards of construction to qualify for Government guaranteed loans. In 1952 the House Committee on Banking and Currency conducted hearings on the quality of new housing constructed under Veterans Administration and Federal Housing Administration plans.[58] The National Association of Home Builders was also proposing to its members that buyers of new housing be given a written warranty of work-

56. Jose-Balz Co. v. DeWitt, 93 Ind. App. 672, 176 N.E. 864 (1931); Minemount Realty Co. v. Ballentine, 111 N.J. Eq. 398, 162 Atl. 594 (1932). The results reached in these two cases support the proposition that a warranty should be implied in the sale of a house to be constructed, or in the process of being constructed. In each case, however, the court rests its decision upon the implied warranty of workmanship and fitness for purpose imposed by the law of contracts where a person promises to perform a particular kind of work, and holds himself out as specially qualified to perform work of a particular character. See 17 C.J., *Contracts* § 522, p. 560 (1939). Does the contract rule apply also in the vendor-purchaser situation where newly constructed houses are involved, and thus override the *caveat emptor* principle in that situation? See Note, *Right of Purchaser in Sale of Defective House*, 4 WESTERN RES. L. REV. 357 (1953). Of the American cases cited in n. 25 of this Note, the Indiana and New Jersey cases cited above are the only ones which can be said to support the proposition asserted.

57. Miller v. Cannon Hill Estates, Ltd., [1931] 2 K. B. 113; Lawrence v. Cassel, [1930] 2 K. B. 83. A later case, Hoskins v. Woodham, [1938] 1 All. E. R. 692, holds that the warranties will not be implied by law where the newly constructed house is *completed* before the sale. Is this crucial legal distinction justified by the factual differences between the purchase of a completed new house and the purchase of a new house in the process of being constructed?

58. See Dunham, *supra* note 55, at 108, citing *Hearings before Subcommittee on Housing of the Committee on Banking and Currency on H. R. 436*, 82nd Cong., 2d Sess. (1952), and N. Y. Times, Mar. 2, 1952, § 8, p. 1, col. 5.

manship and quality of materials.[59] During the same year the New York legislature had before it a bill to require builders to post a bond to guarantee the workmanship and materials in new housing; and the English legal journals were concerned with the question whether, under the Town and Country Planning Act and the standard land contract, a vendor warranted the use or fitness of property sold.[60]

Newspapers are currently headlining alleged scandals in FHA control of housing standards as reported by the Senate's Committee on Banking and Currency. The National Association of Home Builders finally decided to have a paper called a "policy" and not a "warranty."[61]

59. Dunham, *supra* note 55, at 108, citing N.Y. Times, Mar. 2, 1952, § 8, p. 1, col. 5. The proposed warranty reads as follows:

"This home meets the requirements of the applicable building code. It has been inspected and approved by local building authorities.

"The home upon delivery to the original purchaser was structurally sound and free from defects in material and workmanship not common to the grade and type of materials used in it.

"For the original purchaser, we will replace or repair, free of cost, any such defects which occur under ordinary use and care before or before resale by the original purchaser, whichever date is earlier. Such defects must be brought to our attention in writing within that time. We do not, of course, assume responsibility for 1) damage due to natural wear and tear, 2) defects which are the result of characteristics common to the materials used, 3) loss or injury caused in any way by the elements, 4) conditions resulting from condensation on, or expansion or contraction of, materials.

"This warranty is limited to the date stated in the preceding paragraph. It is the only warranty made or authorized by us with respect to the above home, and is in lieu of all other warranties expressed or implied and of all other obligations or liabilities on our part, whether with respect to material or workmanship in the home, damage to the purchaser or others, or to his or their effects, or otherwise. We make no warranty beyond the time above stated, even though the claimed defect does not become apparent within such time.

"This warranty is solely for the protection of the original purchaser whose signature appears below."

60. *Id.* at 108-09 nn 1-3.

61. *Id.* at 109. The proposed "policy" reads:

"HOME OWNER'S SERVICE POLICY

"(1) We hope you will be happy in your NEW HOME. It has been constructed in accordance with accepted home building practices. It has been inspected by our trained personnel and, where required, by the building department of the municipality in which it is situated.

"(2) As a matter of policy we will, upon written request to our office at the address appearing on this Service Policy, made within 6 months from the date of delivery to you of title to this Home (subject, however, to Paragraph 4 below) inspect your home as promptly as possible; and, where shown by such inspection to require adjustment by reason of defects in workmanship or material, we will make reasonable and necessary repairs or adjustments without cost to you.

"(3) A Manual of Suggestions on the care and maintenance of your New Home is given you with this Service Policy. Please read it carefully! It will help you to understand the minor adjustments to most newly constructed homes necessary in their first few months. It will aid you in the proper care of your Home so that its value may be preserved for a long time. Specific reference is made in the Manual to the extent and duration of such responsibility as manufacturers or others have for the work done or equipment installed by them.

"(4) This Home Owner's Service Policy is non-transferable. Any obligation under it terminates if the property is resold or shall cease to be occupied by the Home Owner to whom it is originally issued.

These developments reflect the wide-spread public concern over this relatively neglected area of land law. Past experience teaches that such public concern usually foreshadows development in the law—both statutory and judge-made.

In the *Dozier* case there was no fraud. But there was a calculated risk taken by the developer that the sewage disposal would function properly. The question remains—who should bear the burden of that risk? In the *Evens* case the court used the *caveat emptor* doctrine to reject a tort theory of due care owed by vendor to purchase. But under the doctrine of implied warranty here discussed, proof of negligence would be unnecessary. As in the use of food, medicine and transportation, the risk of faulty production under this theory is one which would be carried by the manufacturer-vendor. The cost of carrying this risk would be a normal business expense.

As a starter, at least such remedies as rescission and the contract measure of damages might be made available. This would provide the relief asked for in the *Dozier* case. It is a good deal short of the tort theory of consequential damages asked for in the *Evens* case. If, however, recovery for breach of implied warranty is to be limited to rescission and contract damages, a tort theory of due care allowing recovery for consequential injuries would seem to be justified upon proof of the creation of unreasonable hazards in housing construction.

Until the law implies such a warranty those few who have sufficient bargaining power may well consider the requirement of an express warranty of workmanship, quality of materials, and fitness for purpose of the building, to be incorporated in the deed of conveyance.

EMINENT DOMAIN

Nature of Interest Condemned: Easement vs. Fee. In *McGiffin v. City of Gatlinburg*,[62] the city, in taking a right-of-way for a street, had also condemned an adjoining tract belonging to the complainants for the purpose of constructing necessary slopes and fills. Although the statue which empowers municipalities to condemn rights-of-way authorizes the taking of "the fee of the land necessary to be taken,"[63] the necessity for taking a fee for highway purposes must be clearly shown because ordinarily an easement is sufficient. Any doubts as to the interest necessary to be taken or the interest which has been taken by condemnation are resolved against the condemning authority.[64]

"(5) This Home Owner's Service Policy and accompanying Manual conforms with the standard requirements of the National Association of Home Builders and its affiliated local association. As a condition of membership in these Associations, we have pledged ourselves to build good homes and to abide by the Home Builders' Code of Ethics in the conduct of our business."

62. 195 Tenn. 396, 260 S.W.2d 152 (1953).

63. TENN. CODE ANN. § 3398 (Williams 1934).

64. 3 NICHOLS, EMINENT DOMAIN 222 (1950); Clouse v. Garfinkle, 190 Tenn. 677, 231 S.W.2d 345 (1950). In the *Clouse* case, a divided court held that the

The proceedings in the *McGiffin* case recited that the city sought "the easement necessary for the construction of slopes and fills," that the land involved was to remain the property of the landowners to be used for any purpose which did not weaken the support of the highway, and that the easement should cease if buildings were erected adjacent to the right-of-way or if the adjacent land were graded to the level of the street. After completion of the highway, the adjacent landowners sought a declaratory judgment that the fee in the land used for slopes and fills had reverted to them. They apparently desired to level off the land and develop it for residential purposes. On demurrer to the bill the chancellor held in their favor and the Supreme Court affirmed.

The Supreme Court treated the interest acquired by the city as a "determinable easement" which expired when the purpose of the easement, construction of slopes and fills, had been accomplished.[65] The holding is a sound one and accords with the purposes of the condemnation. Although the language of the opinion is to the effect that the city no longer has "any interest" in the tract involved, it no doubt retains a right to lateral support.[66]

Closing of Highway: Rights of Abutting Owners. The flooding of a county highway by a TVA reservoir[67] led to the controversy in *Stewart v. Sullivan County.*[68] TVA and the county entered into a contract whereby the authority agreed to substitute new roads for those flooded and to indemnify the county against any liability it might incur as a result. The complainants, forty-four citizens of Sullivan County, owned property which abutted on the rural road and through it they had access to a federal highway, public schools and the nearby city. They alleged that a substitute road furnished by TVA was inadequate and impassable during winter months and lengthened their journey into the city by six miles. After an unsuccessful petition to

City of Nashville had taken only an easement for a street because of the recital in its condemnation petition that it was proceeding under code section 3109 which does not authorize the taking of a fee and the statement in the petition that the taking was "for street purposes" which required only an easement. This result was reached although the petition made several references to "the value of the fee" and the decree divested "title" out of the owner.

65. *Accord,* Scott v. Alden, 140 Tex. 31, 165 S.W.2d 449 (1942); *see also* Irvin v. Pettifils, 44 Cal. App. 2d 496, 112 P. 2d 688 (1941). *See* 2 AMERICAN LAW OF PROPERTY 298 (Casner ed. 1952). 17 AM. JUR., *Easements* 137 (1938).

66. Haverstraw v. Eckerson, 192 N.Y. 54, 84 N.E. 578, 20 L.R.A. (NS) 287 (1908). The condemnation petition in the *McGiffin* case recited that the abutting owners could use the land for any lawful purpose which did not weaken the support of the highway.

67. If the Federal Government, as an incident of a project undertaken to improve navigation, floods land which is located on a nonnavigable tributary or above the high water mark of a navigable stream, it is a compensable taking of private property. United States v. Chicago, M. & St. P. R. Co., 312 U.S. 592, 61 Sup. Ct. 772, 85 L. Ed. 1064 (1941).

68. 264 S.W.2d 217 (Tenn. 1953).

the county judge for proceedings under the applicable private statute[69] to assess their damages, the landowners sought a declaratory judgment as to their substantive rights joining TVA and the county as defendants. It was held that they stated a claim for the taking of their easement rights in the old road without compensation.

The substantive question presented by the *Stewart* case involves the nature of the rights of abutting owners in the road which the defendant county, in effect, closed by its cooperation with TVA in the inundation of it. The court analyzed the question simply in terms of the rights of abutting owners when a road is unlawfully obstructed. It is well established that such owners may recover for special injuries caused by a private *individual's* unreasonable obstruction of a road,[70] but an obstruction caused by the action of *public officials* presents a different question. The proper public authorities may alter or vacate a route if it is reasonably justified in the public interest and they proceed in the manner prescribed by law.[71] However, those who own land abutting on a public way and who depend upon the road, for access to and from their property have easement rights in the road much in the nature of ways of necessity, and these easements are not lost even upon a lawful vacation of the road.[72] The essence of the holding in the *Stewart* case is that the complainants had a cause of action against the county for a taking of these easement rights without compensation.[73]

The other problem presented by the case is a procedural one. The court viewed the county's contract with TVA as an election by the county to substitute the indemnity clause of the contract for the statutory procedure for settling condemnation claims. Although it is doubtful that a county may vary the statutory provisions for condemnation proceedings in a manner which would bind injured landowners,[74]

69. Tenn. Priv. Acts 1929 c. 201.

70. Blake v. Skelton, 5 Tenn. App. 539 (M.S. 1927); Hill v. Hoffman, Tenn. Ch. App. 58 S.W. 929 (1899); 25 AM. JUR., *Highways* § 273 (1938).

71. Anderson v. Turbeville, 46 Tenn. 150 (1868); 25 Am. Jur., *Highways* §§ 106, 118; (1938); *but see* 2 NICHOLS, EMINENT DOMAIN 497 (1950). It is generally required that a new highway be provided before vacation of an old one is proper. Boss v. Deak, 201 Ind. 446; 169 N.E. 673 (1930). Cases are collected at 68 A.L.R. 795 (1930). Section 2731 of the Tennessee Code requires five days notice to abutting owners before changing or closing a road.

72. Anderson v. Turbeville, 46 Tenn. 150 (1868). See Scheper v. Clark, 124 S.C. 302, 117 S.E. 599 (1923) and cases collected at L.R.A. 1917 A 1123. The easement of an abutting owner *in* a roadway should not be confused with his easement of access to and from the way. See Illinois Central R.R. v. Moriarity, 135 Tenn. 446, 186 S.W. 1053 (1916); Sharber v. City of Nashville, 27 Tenn. App. 625, 183 S.W.2d 777 (M.S. 1944).

73. The Tennessee case nearest in point is Morgan County v. Goans, 138 Tenn. 381, 198 S.W. 69 (1917). There the county changed the grade of a main highway so as to cut off access to a side road. The complainant, who owned property abutting on the side road, recovered damages from the county for obstructing her ingress and egress to the main highway.

74. Although the power of eminent domain is inherent in sovereignty, the exercise of the power is entirely dependent upon statute and ordinarily the

when the statutory remedy can not be initiated by the landowners and the condemnor refuses to do so,[75] the landowners clearly may resort to a common law action for damages.[76] It was also held that TVA was liable to the complainants under the doctrine of third party beneficiary rights in contract law and therefore it was properly joined as a party defendant.

Condemnor's Separate Treatment of Lessor and Lessee: A novel problem in administration of eminent domain proceedings was presented in *Stapleton v. State,* ex rel. *Spur Distributing Co.*[77] The City of Knoxville instituted proceedings to take a tract of land which was in possession of the Spur Company as lessee. The commissioners reported separate awards of $32,094 to Robinson, the landlord and owner of the fee, and $15,000 to Spur for its leasehold which had fourteen years to run. A resolution of the City Council approved "these amounts" and they were paid to Stapleton, the city recorder, pursuant to the applicable statute.[78] Robinson, the landlord, then appealed to circuit court challenging the right of the city to take. Notwithstanding this appeal, the city demanded that the lessee, the Spur Company, surrender possession of the premises.[79] It did so, but the city recorder refused to pay the lessee its award, reasoning that the landlord's appeal carried the rights of all parties[80] to the circuit court for trial *de novo*[81] and that the lessee's share of the total award depended upon the circuit court's disposition of the question of damages. It was held that mandamus should issue to compel the recorder to pay the lessee's award.

The Supreme Court found it unnecessary to consider the question of whether the circuit court might vary the amounts of the awards on appeal and thus possibly require the city to pay total awards

provisions of the authorizing law must be strictly followed. 3 AMERICAN LAW OF PROPERTY 592 (Casner ed. 1952); 18 AM. JUR., *Eminent Domain* § 312 (1938).

75. In the *Stewart* case the county judge was not made a party defendant but the court intimated that mandamus would have issued to compel him to institute proper statutory proceedings had he been made a party.

76. Markowitz v. Kansas City, 125 Mo. 485, 28 S.W. 642 (1894); Phillips v. Postal Telegraph Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902); 6 NICHOLS, EMINENT DOMAIN 357 (1950).

77. 195 Tenn. 144, 258 S.W.2d 736 (1953).

78. TENN. CODE ANN. §§ 3397-3401 (Williams 1934).

79. Although Code Section 3401 provides that "any such appeal shall not operate to prevent the municipality from taking possession of the land condemned, nor stay the opening of an extension of any such street, alley or other improvement," it has been construed to allow the taking of possession by the condemnor pending appeal only if the appeal is solely on damages. If the owner makes a bona fide contest of the right of the city to condemn, possession is postponed until a final determination of that right. Georgia Industrial Realty Co. v. Chattanooga, 163 Tenn. 435, 43 S.W.2d 490 (1931).

80. Compare State *ex rel.* Weaver v. Bolt, 130 Tenn. 212, 169 S.W. 761 (1914); Parsons v. Kinzer, 71 Tenn. 342 (1879); Grubb v. Browder, 58 Tenn. 299 (1872).

81. Appeals in eminent domain cases are generally tried *de novo.* Towson v. DeBow, 37 Tenn. 193 (1856); 18 AM. JUR., *Eminent Domain* § 375 (1938).

greater than the value of the unencumbered fee. The city had demanded possession from the lessee with knowledge that its rights to condemn the landlord's interest was still undetermined. This, added to the City Council's approval of the separate amount awarded to the lessee, was held to be an election by the city to deal separately with the leasehold interest.

Although a condemnation award is normally equal to the value of the unencumbered fee,[82] the city may, if it chooses, deal separately with the lessee.[83] However, it is difficult to believe that the city in taking land for street purposes ever contemplated that it might acquire only a fourteen-year lease. Yet this will be the result here if it is denied the right to take the fee upon Robinson's appeal.

The *Stapleton* case should be a lesson to condemning authorities. If the right to take is challenged by an appeal by the owner of any one of the several interests in a piece of property, the city must defer taking possession of any interest until its right to condemn the particular tract is determined. The result in the *Stapleton* case seems fair even though the city may find itself with a useless leasehold. When possession was demanded of the lessee, he was not bound to resist in legal proceedings a taking in which he might choose to acquiesce. Having surrendered possession, he was entitled to payment of his separate award which he also chose to recognize.

Excessive or Unauthorized Taking by the Condemnor: An excessive condemnation of land for a new federal office building in Nashville brought an interesting Federal District Court decision in *United States v. Certain Real Estate in Nashville.*[84] Original construction plans called for an L-shaped building and the Puckette tract was taken, apparently pursuant to this plan, under the Declaration of Taking Act.[85] Prior to the condemnation, however, this plan had been abandoned and a rectangular building was constructed outside this tract. The owners had gone to trial on the issue of compensation without challenging the right to take. This trial was set aside and they then sought to recover possession of their property because the taking of the tract, now being used for additional storage and office space and as a parking lot for federal employees, was for a purpose not authorized by law.

The district court restored the property to its original owners on the theory that its taking was unnecessary and unlawful because Congress had appropriated funds only for construction of a *new* build-

82. For the principles governing apportionment of awards between landlord and tenant, see JAHR, EMINENT DOMAIN, VALUATION AND PROCEDURE 189 (1953); 2 NICHOLS, EMINENT DOMAIN § 5.3 (4) (1950).
83. See Mason v. City of Nashville, 155 Tenn. 256, 291 S.W. 1074 (1926).
84. Civil No. 798, M.D. Tenn., Aug. 20, 1953.
85. 46 STAT. 1421 (1931); 40 U.S.C.A. § 258a (1952).

ing, not the acquisition and remodeling of an existing structure or a private parking lot for Government employees.

Since the case does not involve Tennessee law and is now on appeal,[86] it will not be given extended treatment here. Ordinarily the right of the condemnor to take is litigated before possession is given[87] and the proceedings are conclusive as to all matters which might have been litigated.[88] However, under the Declaration of Taking Act, title is vested in the United States upon filing of the declaration of taking and deposit of the appraised value of the property in court.[89] The Government apparently argued in the instant case that the owner's failure to contest the right to take before going to trial on compensation estopped them from later raising the question. The court found no basis for an estoppel because the owners had no means of knowing that their property would not be used for construction of the new office building, either at the time of the filing of the declaration or at the time of trial.

If property is lawfully condemned but is never used for a proper public purpose, the right of the original owner to recover possession depends upon whether the nonuser amounts to an abandonment by the condemnor and whether a fee simple or easement was taken.[90] But the court found that the Government at the time it instituted condemnation proceedings had no intention to put the Puckette tract to a necessary and authorized use. Therefore the taking itself was unlawful. The case is then within the principle of those decisions allowing appropriate proceedings protecting or restoring the landowner's possession against an unlawful taking under color of eminent domain.[91]

86. No. 12,801, U.S. Court of Appeals, Sixth Circuit.

87. 18 AM. JUR., *Eminent Domain* §§ 331, 332 (1938); Georgia Industrial Realty Co. v. Chattanooga, 163 Tenn. 435, 43 S.W.2d 490 (1931).

88. Wilton v. St. John's County, 98 Fla. 26, 123 So. 527 (1929); Ketchum Coal Co. v. District Court, 48 Utah 342, 159 Pac. 737 (1916). For a discussion of recent Tennessee cases on the right of a landowner to recover unforeseen damages after condemnation proceedings are closed, see Trautman, *Real Property—1953 Tennessee Survey*, 6 VAND. L. REV. 1080, 1091 (1953).

89. Whether the Government also acquires the right to possession at this time is unsettled. If the court grants the condemnor an order of possession it may not be appealed until the question of compensation is also determined. *Query*, whether the owner's remedy by appeal is adequate to protect him against irreparable injury. See Catlin v. United States, 324 U.S. 229, 65 Sup. Ct. 631, 89 L. Ed. 911 (1945); Porto Rico Telegraph Co. v. Porto Rico Communications Authority, 189 F.2d 39 (1st Cir. 1951); Porto Rico Ry. Light & Power Co. v. United States, 131 F.2d 491 (1st Cir. 1942). If irreparable injury will result from immediate possession by the government, the owner who questions the right to take should be able to seek injunctive relief and thus secure a final and appealable adjudication of this question before possession is awarded.

90. 18 AM. JUR., *Eminent Domain* §§ 123, 124 (1938). If the condemnor acquires a fee by a lawful taking no abandonment or nonuser can work a reversion to the owner. See Clouse v. Garfinkle, 190 Tenn. 678, 231 S.W.2d 345 (1950), also discussed in note 64 *supra*.

91. 6 NICHOLS, EMINENT DOMAIN § 28.3(1), p. 396 n. 94 (1950); 18 AM. JUR., *Eminent Domain* §§ 386, 387 (1938).

The court's decision on the necessity of the taking of the Puckette tract raises the question of the extent to which a court will review an administrative determination that certain property is necessary for an authorized project. Although the public nature of a use or the legality of the purpose of a taking is a judicial question, the courts will ordinarily not review an administrative finding as to the necessity or propriety of a taking unless it be challenged as arbitrary or capricious.[92]

92. See United States v. Carmack, 329 U.S. 230, 67 Sup. Ct. 252, 91 L. Ed. 209 (1946); United States *ex rel.* TVA v. Welch, 327 U.S. 546, 66 Sup. Ct. 715, 90 L. Ed. 843 (1946); Cincinnati v. Vester, 281 U.S. 439, 50 Sup. Ct. 360, 74 L. Ed. 950 (1930); United States v. State of New York, 160 F.2d 479 (2d Cir. 1947); United States v. 209.5 Acres, 108 F. Supp. 454 (W.D. Ark. 1952), *rev'd sub. nom* United States v. Willis, 211 F.2d 1 (8th Cir. 1954).