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Real Property

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Commission of Ohio.[1] The Cincinnati Gas Company and the City of Cincinnati challenged the validity of the ninth of a series of emergency orders issued by the Public Utilities Commisson of Ohio prohibiting the addition of space heating customers. Such a "freeze" order had previously been upheld by the Supreme Court of Ohio in the case of *Akron v. Public Utilities Commission of Ohio*,[2] but the question of unlawful delegation of legislative power had not been considered in that case.

In affirming the action of the Commission, the court found that such an emergency order was within the power of the Public Utilities Commission in protecting the health, safety and welfare of the public. The court held that there was no unlawful delegation of legislative power to the public utility because the obligation imposed upon the utility company to police such an order was merely a ministerial duty. The discretion reposed in the utility company by the rule merely required the company to discontinue service to any consumer who was in violation of the restriction.

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REAL PROPERTY

Deeds

Hollman v. Smith[1] sustained, as between the grantor and the grantee's successor, a deed that was delivered before, but acknowledged after the death of the grantee. The grantee had received equitable title prior to her death. In Ohio acknowledgment of a deed is not merely a prerequisite to recording as in many states,[2] but is essential to pass legal title.[3] It is doubtful whether the court in this case would have sustained the deed if equitable title had not passed to the grantee prior to her death.

Vesy v. Giles[4] states that consideration is not necessary to validate a deed. This statement is very probably the law in Ohio[5] and other states[6] but it is weakened by the fact that there was a recital of consideration in the deed. This recital the court considered superfluous.

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[1] 157 Ohio St. 574, 106 N.E.2d 642 (1952).

[2] 149 Ohio St. 347, 78 N.E.2d 890 (1948).

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[1] 102 N.E.2d 483 (Ohio App.), *appeal dismissed*, 156 Ohio St. 227, 101 N.E.2d 730 (1951).

[2] 3 AM. LAW OF PROPERTY § 12.60 (1952); PATTON, TITLES § 179 (1938).

[3] OHIO GEN. CODE § 8510.

[4] 108 N.E.2d 300 (Geauga Com. Pl. 1952).

[5] *See* Brown v. Whaley, 58 Ohio St. 654, 665, 49 N.E. 479, 480 (1898); Thompson v. Thompson, 17 Ohio St. 649, 655 (1867)

[6] 3 AM. LAW OF PROPERTY § 12.43 (1952).

The Supreme Court of Ohio in *McMechan v. Board of Education*[7] construed strictly the Act of 1860[8] which conferred on township boards of education the power of eminent domain to procure schoolhouse sites. The court held that the failure of the Act to authorize the taking of a fee simple title gave township boards of education only the power to acquire the "use" of property for schoolhouse sites. Although the acquisition of an easement to use land as a schoolhouse site is unusual, the court apparently meant that when the board of education acquired the "use" of the land for school purposes it obtained only an easement in fee simple determinable ("conditional fee").

Two of the cases cited by the court in support of its opinion in the *McMechan* case might have been cited to support an opposite decision. One of these cases, *Malone v. Toledo*,[9] held that the Act, authorizing the state to acquire the "fee simple" of land needed for a canal, authorized the taking of the fee simple absolute title and not the fee simple determinable title. Strict construction in the *Malone* case would have limited the power of the state to the acquisition of the fee simple determinable title. The court in the *Malone* case took into consideration the fact that the state owned in fee simple absolute land acquired by gift or voluntary purchase for canal purposes and therefore would obviously wish to own in fee simple absolute all land used for canal purposes. Likewise, the township boards of education undoubtedly owned in fee simple absolute land acquired by gift or voluntary purchase.

In the other case, *Henry v. Columbus Depot Co.*,[10] cited as authority for the majority opinion in the *McMechan* case, the court quoted with approval this statement from *Ruling Case Law:* " it is well settled that when land is taken for the public use, *unless the fee is necessary for the purposes for which the land is taken, as for example when land is taken for a schoolhouse* or the statute expressly provides that the fee shall be taken, the public acquires only an easement."[11] [Italics added].

Concurrent Ownership

The court of appeals held in *Cohen v. Cohen*[12] that a tenant in common who alone occupies a jointly owned house does not have to account to her co-tenants. The court of appeals arrived at this conclusion by using the income tax definition of profits to construe the ancient phrase "rents and

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[7] 157 Ohio St. 241, 105 N.E.2d 270 (1952).
[8] 57 OHIO LAWS 9 (1860).
[9] 34 Ohio St. 541 (1878).
[10] 135 Ohio St. 311, 20 N.E.2d 921 (1939).
[11] 10 R.C.L. 89.
[12] 89 Ohio App. 389, 102 N.E.2d 712 (1951).

profits" used in Ohio General Code Section 12046. The supreme court, however, reversed the decision and required the occupying tenant to account to her co-tenants for their share of the "rents and profits" received from occupancy.[13]

Although personal property was involved in In re *Reiner's Estate*[14] the court's decision may affect real property law as well. The probate court added a little more confusion to property law by stating that upon the death of one joint tenant his interest "descends" to the surviving tenant. The generally accepted explanation of survivorship in a joint tenancy is that each joint tenant owns the whole and on the death of either joint tenant his interest simply ceases. The surviving joint tenant continues to own the whole.[15] The court in this case also said that most states have abolished joint tenancy. The court probably meant to say that the presumption in favor of joint tenancy has been abolished in most states as to grantees who are not fiduciaries.[16]

The phrase "joint tenancy" as used in opinions of Ohio courts may refer to (1) tenancy in common for life with contingent remainders, or (2) tenancy in common in fee simple with executory interests or (3) contractual relationship.[17]

When is a tenant in common entitled to partition under Ohio General Code Section 12026? Section 12026 simply states: "Tenants in common of any estate in lands may be compelled to make or suffer partition." An early Ohio Supreme Court case, *Tabler v. Wiseman*,[18] had construed the phrase "tenants in common" as used in this section to mean only tenants in common in *possession* or who have the immediate right to possession. The court held that a reversioner or remainderman after a life estate is not entitled to partition under Section 12026. In *Rawson v. Brown*[19] the Ohio Supreme Court had recognized the right of a tenant in common of a fee simple subject to a renewable ninety-nine year lease ("perpetual lease") to maintain an action of partition because the possession of the lessee was the possession of the lessors.

Last year a common pleas court in *Foppe v. Foppe*[20] refused to allow a tenant in common of a fee simple subject to an estate for one year to bring

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[13] Cohen v. Cohen, 157 Ohio St. 503, 106 N.E.2d 77 (1952).

[14] 106 N.E.2d 94 (Hamilton Probate Ct. 1952)

[15] 3 AM. LAW OF PROPERTY § 14.17 (1952).

[16] 2 AM. LAW OF PROPERTY § 6.3 (1952).

[17] Note, *Survivorship Deeds in Ohio*, 3 WEST. RES. L. REV. 60 (1951).

[18] 2 Ohio St. 208 (1853); *accord*, Eberle v. Gaier, 89 Ohio St. 118, 105 N.E. 282 (1913).

[19] 104 Ohio St. 537, 136 N.E. 209 (1922).

[20] 103 N.E.2d 319 (Hamilton Com. Pl. 1951).

an action for partition because the tenant in common did not have possession. The holding in the *Foppe* case is contrary to the decisions that tenants in common who have the seisin are considered in law to be in possession of the land within the meaning of statutes similar to Section 12026.[21] The fact that the owner of the estate for one year in the *Foppe* case did not pay rent, whereas the owner of the "perpetual lease" in the *Rawson* case paid rent, is immaterial if seisin in the tenant in common is the important factor in these partition cases.

Registered Title

Prior to August 18, 1937, assessments for local improvements were liens on land registered under the Torrens Act only if a notice of the assessment was filed with the county recorder in accordance with Ohio General Code Section 8572-56. The City of South Euclid neglected to comply with this section of the Torrens Act. In 1937 and 1940 the City of South Euclid respread by reassessment the earlier assessments. No notice of these reassessments was filed with the county recorder. The City of South Euclid attempted to enforce these reassessments against persons who purchased registered land at forfeited land sales. The Supreme Court of Ohio held in *Gunderson v. South Euclid*[22] that these earlier assessments were not liens prior to 1937 and were not made liens by the reassessments after 1937

Adverse Possession

Does possession cease to be adverse when the adverse possessor orally agrees to hold under the true owner and to pay rent? The court of appeals in *Manos v. Day Cleaners & Dyers*[23] held that the oral lease did not stop the running of the statute of limitations because the true owner never lost his right to eject the adverse possessor. This decision is subject to criticism because a tenancy at will can be created orally. A tenant at will is not an adverse possessor. Also, a tenancy at will deprives the owner of his right to hold the tenant liable as a trespasser.

Easements

Two recent supreme court cases upheld the right of an owner of property that abuts on a public street to an easement of access to the street. *McKay v. Kauer*[24] recognized the right of an owner to compensation for damage to his property caused by lowering the grade of the abutting street. *Northern Boiler Co. v. David*[25] declared invalid an ordinance that allowed a single

[21] 1 AM. LAW OF PROPERTY § 4.94 (1952).
[22] 157 Ohio St. 437, 105 N.E.2d 863 (1952).
[23] 91 Ohio App. 361, 108 N.E.2d 347 (1952).
[24] 156 Ohio St. 347, 108 N.E.2d 703 (1951).
[25] 157 Ohio St. 564, 106 N.E.2d 620 (1952).