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# Real Property

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## Adverse Possession

The purpose of the statute of limitation with respect to actions to determine title to real property is to quiet titles. Therefore, the Clinton County Court of Appeals in *Sinclair Refining Co. v. Romohr*[1] properly held that there is sufficient privity of estate between a purchaser of a lot at an adminstrator's sale and the heirs and their ancestor to permit the purchaser to tack his adverse possession to the prior adverse possession of the heirs and of their ancestor. The court also properly held that the transfer of possession by one person to another is sufficient privity of estate to permit tacking, and that therefore it is immaterial that the description in the deed from the administrator to the purchaser did not include the portion of the lot claimed adversely.[2] In Ohio many boundary lines have been inadequately described in deeds or have become uncertain through the disappearance of monuments.[3] The acquisition of title by adverse possession is a solution to some of these boundary disputes.

## Covenants of Title

The desirability from the purchaser's point of view of receiving a deed with the usual covenants of title, including the covenant against incumbrances, is demonstrated by the facts and decision in *Espy Realty Co. v. Burton-Rodgers, Inc.*[4] In this case the grantor was properly held liable on his covenant against incumbrances for the amount of a special assessment which the grantee had to pay because the grantor had tapped into a sewer line without a permit. Although the point was not before the court, in answer to the grantor's argument that under the assessing ordinance no lien against the property conveyed could exist prior to the time this property was connected to the new sewer, the court stated that a lien of this type exists from the date of the assessment and not from "the maturity of the assessment as a debt."

With respect to known, unpaid assessments, a purchaser of property may justifiably request the vendor to deduct from the purchase price any unpaid assessments for special projects, such as a street, which have been completed. When a special project has been completed, the value of the im-

[1] 95 Ohio App. 93, 117 N.E.2d 489 (1953).

[2] 4 TIFFANY, REAL PROPERTY 436 (3d ed. 1939).

[3] PETERS, OHIO LANDS 98 (3d ed. 1930); Broadsword v. Kauer, 161 Ohio St. 524, 120 N.E.2d 111 (1954); Sinclair Refining Co. v. Romohr, 95 Ohio App. 93, 117 N.E.2d 489 (1953).

[4] 94 Ohio App. 417, 116 N.E.2d 14 (1952).

provements is probably included in the selling price of the property; yet the vendor in the contract of sale may also require the purchaser to pay the unpaid amount of the special assessment. Consequently, when the purchaser pays the special assessment he has then probably paid more than the market value of the property.[5]

## Capacity

The case of *Churches of God v. Walden*[6] involved a construction of Ohio General Code, Section 10055. The applicable portion of this section provides that when the trustees of a church organization sell and convey its real estate "by deed in fee simple" without first receiving the approval of the court of common pleas of the county in which the real estate is located and when the grantee and its successors have held "continued, exclusive, notorious and adverse possession of the real estate" for five years from the date of conveyance, then the conveyance is as valid as if confirmed by the court of common pleas. The Cuyahoga County Court of Appeals held that under this section of the Ohio General Code the conveyance by the trustees of a church without approval of the court of common pleas to a grantee who enters into, and remains in possession for five years is voidable during the five-year period but valid thereafter. Consequently, the conveyance of church real estate on September 1, 1952, by the trustees of the church without court approval is voidable and not void. The grantee under a deed of September 1, 1952, according to this decision, is now in "adverse possession," as that phrase is used in Section 10055 of the Ohio General Code, under a voidable deed. An interesting question is whether this conveyance will ever become indefeasible since the provisions of Section 10055 are not included in the Ohio Revised Code.

Section 1702.39 of a proposed Ohio Non-Profit Corporation Law, which has been prepared by the Corporation Law Committee of the Ohio State Bar Association, does not require court approval of a sale of the real estate of a non-profit corporation.[7] Subdivision (c) of this proposed section provides that any action to set aside a conveyance on the ground that it was made by a non-profit corporation without complying with any applicable section of the Revised Code must be brought within ninety days after the conveyance. Since the provisions of Section 10055 of the Ohio General Code relate to unincorporated and incorporated charitable or religious associations, the Committee should consider the desirability of including in its proposed Ohio Non-Profit Corporation Law a section to

[5] BICKS, CONTRACTS FOR THE SALE OF REALTY 7 (1946).

[6] 116 N.E.2d 215 (Ohio App. 1953).

[7] 28 OHIO BAR 17, 135 (1955).

cover the situation in which a non-profit corporation has conveyed real estate without a court order and the grantee's title did not become valid under Section 10055 prior to its repeal. Although the primary purpose of this committee is the preparation of a Non-Profit Corporation Law it might properly consider the desirability of a special statute which would validate conveyances of real estate by trustees of unincorporated charitable organizations which conveyances were still voidable when Section 10055 was repealed by the adoption of the Ohio Revised Code.

## Delivery

The legal requirement that a deed conveying an interest in real property must be delivered to be effective is a well recognized and elementary rule. But, men learned in the law at times differ as to whether or not there has been delivery in a particular case. Such a situation occurred in *Kniebbe v. Wade*[8] in which the Ohio Supreme Court with one judge dissenting and the Chief Justice not participating reversed the court of appeals and the court of common pleas. In this case, *H* and *W*, husband and wife, owned four parcels of land as tenants in common. Each spouse executed for each parcel of land an absolute deed which purported to convey the grantor's undivided half interest as tenant in common to the other spouse who already owned an undivided half interest in the same land as tenant in common. The eight deeds (four signed by *H* and four signed by *W*) were duly executed in the office of a real estate agent and then were taken home by *W* and placed in a box to which both *H* and *W* had access. After *H's* death *W* recorded the four deeds to her from *H*. A child of *H* by a prior marriage filed a petition against *W* for a declaratory judgment to determine the validity of these deeds. The court of common pleas and the court of appeals both upheld the deeds from *W* to *H* and declared the deeds from *W* to *H* to be ineffective. The Ohio Supreme Court reversed these decisions and held that all the deeds were testmentary and therefore invalid for want of delivery.

Although the facts in *Kniebbe v. Wade* are not entirely clear, the case has some of the aspects of conditional delivery of deeds by the grantor to the grantee. The condition is that the grantee must survive the grantor and not merely that the grantor must die. The general rule is that conditional delivery of a deed is absolute delivery.[9] Consequently, the statement by the Ohio Supreme Court that "manual transfer of a deed does not constitute delivery unless it is coupled with an intent of a present, immediate and unconditional conveyance of title" seems to deny the general rule with re-

[8] 161 Ohio St. 294, 118 N.E.2d 833 (1954).

[9] 3 AM. LAW OF PROPERTY 316 (1952).

spect to conditional delivery. But, when this language is read in connection with the statement that *H* had access to the box in which the deeds were kept and that *H* took some deeds from this box and destroyed them, the language simply means that the deeds were ambulatory, that is testamentary.

If the deeds had been properly written and delivered, *H* could have conveyed by *W* by deed an executory interest (sometimes called a springing use) so that if *H* predeceased *W*, *H*'s undivided half interest in each of the four parcels would vest in *W*. *W* could have made the same type of conveyance to *H* to vest if *W* predeceased *H*. These deeds could have been recorded immediately after their delivery.

If the four testamentary deeds from *H* to *W* in *Kniebbe v. Wade* were executed in accordance with the Ohio statutory formalities for the execution of wills, would such deeds be sufficiently testamentary to be probated as *H's* will?[10]

## Description

A perfect description of a tract of land is one which accurately describes all sides of the tract so that at any future time the tract can be located on the ground without reference to any natural or artificial monuments which may be used to mark the sides of the tract at the time the description is written. Descriptions of this type are possible but they are presently unusual in Ohio.

*Haller v. Holthouse*[11] was an action to quiet title to a sixty-three foot strip of land. A secretary in a law office who was inexperienced in the writing of descriptions inadvertently included in the deed to plaintiff *Haller* a fifty-one-foot strip of land in the description of a twelve-foot strip. The court ordered the reformation of this deed because the acts of the plaintiff *Haller* and the defendant *Holthouse*, who claimed title to the fifty-one foot strip under a later deed from plaintiff's grantor, after plaintiff and defendant received their respective deeds, clearly and convincingly showed that both parties believed that the plaintiff's deed conveyed only the twelve-foot strip.

The inadequacy of discriptions of land which rely on natural or artificial monuments is obvious from the statement of the court in *Sinclair Refining Co. v. Romohr*.[12] The court said that from the evidence in the case "it appears that there are no authentic monuments in the village of Blanchester from which lot lines can be definitely located."

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[10] *In re* Edwall's Estate, 75 Wash. 391, 134 Pac. 1041 (1913); 1 PAGE, WILLS 132 (1941).

[11] 121 N.E.2d 662 (Ohio App. 1952).

[12] 95 Ohio App. 93, 117 N.E.2d 489 (1953).

Although a highway is a monument and monuments as a general rule prevail over courses and distances, this rule is inapplicable when the exact location of the boundaries of the highway are not known. In *Broadsword v. Kauer*[13] the Ohio State Highway Director contended that the width of Highway No. 45 is 99 feet and that the width of Highway No. 224 is 132 feet at their intersection. The trial court found that the width of Highway No. 224 is fifty feet and the width of Highway No. 45 is sixty feet. The court of appeals agreed with the highway director, but the Ohio Supreme Court agreed with the trial court. This case reveals the possible need for a state-wide program to establish and mark the boundaries of all tracts of land which are publicly owned. A program to establish the boundaries to all publicly owned lands and to rewrite the descriptions to assure future relocation of these boundaries even though all markers may disappear would be a big step toward the establishment of accurate tract indices by county for all land in the state.

In *Greenberg v. L. I. Snodgrass Co.*[14] the Ohio Supreme Court properly held that when a grantor has title to the center of a vacated street a conveyance of a lot which adjoins the street includes the portion of the street owned by the grantor unless it is expressly excluded. The fact that the description called for a line "west with the south line of McGregor Avenue" did not indicate that the grantor intended to retain title to the southern half of McGregor Avenue which abutted the lot conveyed. The court did not consider whether this rule would apply if the grantor owned two lots directly opposite to each other on a vacated street and conveyed only one lot without expressly including or excluding any portion of the street. However, in order to promote general uniformity with respect to the ownership of land to the center of the street, the fact that a grantor owned a lot directly across the street from the lot conveyed should be immaterial.

## Mineral Rights

In *Franklin v. Callicoat*[15] the plaintiff asked the court to enjoin the defendant from interfering with the plaintiff's exercise of his alleged right to strip-mine the defendant's farm. Plaintiff is the successor to the mineral rights with respect to defendant's farm which were conveyed in 1905 by a recorded deed to plaintiff's grantor by George Corn whose interest the defendant now owns. Although, some of the language of the deed of 1905 to plaintiff's grantor is sufficiently broad to include the right to strip-mine, the court construed this broad language as use at a time when strip mining

[13] 161 Ohio St. 524, 120 N.E.2d 111 (1954).
[14] 161 Ohio St. 351, 119 N.E.2d 292 (1954).
[15] 119 N.E.2d 688 (Lawrence Com. Pl. 1954).

was unknown and in connection with other language of this deed which required pipes to be laid at a sufficient depth "so as not to interfere with the agricultural purposes." This decision is in accord with the general principle of construing a deed in its entirety. Another factor which enabled the court to protect the owner of the surface is the fact that the deed to plaintiff's grantor did not negative the duty of the owner of minerals to support the surface but indirectly set forth this duty by its reference to use of the surface for agricultural purposes.

## Partition

The action for partition in *Elliott v. Jerman*[16] is very interesting. According to the opinion of the court, the plaintiff alleged that she had an undivided one-third interest in certain real property and that each of *three* defendants had a one-third interest in the same property! The defendants failed to answer, and the court entered a decree finding the interests of the parties to be as alleged in the petition! But the court was able to avoid the problem of dividing the net proceeds from the sale of the property into four equal portions of one-third each, because one of the defendants and her daughter filed a petition to set aside the court's decree on the ground that all the owners of the property were not made defendants and that the decree ordered distribution to certain persons who owned no interest in the property. Although the plaintiff insisted upon distribution to the persons who claimed no interest in the property, the court was able to set aside its earlier decree and to do justice because partition is an equitable action.

## Eminent Domain

The cases involving eminent domain are numerous and varied. The power of eminent domain was asserted by an agricultural society to obtain land for agricultultural fairs;[17] by a Delaware corporation to obtain a right of way in Ohio for its pipe line;[18] by a city transit system to obtain an additional right of way;[19] by a state turnpike authority to obtain an easement which would prohibit the erection of signs on land which adjoins a turnpike;[20] by a state director of highways to relocate certain highways;[21] by

[16] 116 N.E.2d 50 (Franklin Com. Pl. 1953).

[17] Fayette County Agricultural Society v. Scott, 96 Ohio App. 6, 121 N.E.2d 118 (1953).

[18] Tennessee Gas Transmission Co. v. Cleveland Trust Co., 120 N.E.2d 137, 143 (Columbiana Prob. Ct. 1953).

[19] Cleveland v. Langenau, 120 N.E.2d 751 (Ohio App. 1954).

[20] Ellis v. Ohio Turnpike Commission, 162 Ohio St. 86, 120 N.E.2d 719 (1954).

[21] Claim of Kincade, 95 Ohio App. 329, 119 N.E.2d 314 (1953); *In re* McKay's Estate, 121 N.E.2d 300 (Ohio App. 1953).

an electric power company to obtain a right of way for its lines;[22] by a city to sell land dedicated many years ago as a public market;[23] and by another city to use for a new public office building and jail the land which had been dedicated many years ago as a public market.[24]

Some of these eminent doman cases merit additional comment. In all of these cases except one the respective courts were liberal in upholding the right of the party who relied upon the power of eminent domain. Only the state turnpike authority was denied the rights it sought.

In *Tennessee Gas Transmission Co. v. Cleveland Trust Co.*[25] the plaintiff, a Delaware corporation, obtained its power of eminent domain from the federal government and secured the approval of an Ohio probate court to bring its action in the Ohio probate court on the theory that: (a) there is no Ohio statute specifically excluding the use of Ohio probate courts by corporations incorporated outside Ohio and to which the federal government has granted the power of eminent domain; (b) the term "corporation" in the Ohio statute which grants to the Ohio probate courts jurisdiction over condemnation proceedings is not restricted to Ohio corporations; (c) Ohio courts have exercised jurisdiction over naturalization and rent control cases without any specific grant of jurisdiction by the Ohio legislature; (d) Ohio has a general policy of cooperating with the federal government; (e) Ohio has authorized its courts to determine cases involving condemnation actions by the federal government.

On the theory that law was designed and intended to serve the organized society of mankind, not to stifle or cripple man's effort to grow, advance and prosper, the Muskingum County Common Pleas Court upheld the right of the City of Zanesville to use for a public office building and jail certain land which had been dedicated about 150 years ago as a public market.[26] The city did not have to pay compensation to any person because no person had any interest in the land after it was dedicated as a public market. Consequently, no private property was taken for public use. Whenever the land is no longer used for a public office building and jail, it reverts according to the court, to a public market if the city does not determine to use it for some other public purposes.

The case of *Babin v. Ashland*[27] which was decided by the Ohio Supreme

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[22] Ohio Power Co. v. Shroyer, 122 N.E.2d 304 (Ohio App. 1954).

[23] Babin v. Ashland, 160 Ohio St. 328, 116 N.E.2d 580 (1953).

[24] Zanesville v. Zanesville Canal & Mfg. Co., 116 N.E.2d 54 (Muskingum Com. Pl. 1953).

[25] 120 N.E.2d 137 (Columbiana Prob. Ct. 1953).

[26] Zanesville v. Zanesville Canal & Mfg. Co., 116 N.E.2d 54 (Muskingum Com. Pl. 1953).

[27] 160 Ohio St. 328, 116 N.E.2d 580 (1953).

Court frees the cities of Ohio from the control of the dead hand. The court held that a city by ordinance and without any special condemnation proceeding may authorize the sale of land held by the city in trust for the public as a market place because the sale was in the public interest and the grantor had retained no interest in the land after it was dedicated as a market.

The Fayette County Court of Appeals in *Fayette County Agricultural Soc. v. Scott*[28] seems to misconstrue the applicable statute by defining the term "application" as meaning the hearing and not the instituting of the condemnation action. The statute required the agricultural society to serve notice of the time and place of application upon the owner of the land to be taken under the power of eminent domain. This notice had to be "served five days before the time of application." The court of appeals failed to realize that the giving of notice of an intention to bring a certain action may be beneficial. Consequently, the court in effect rewrote the statute to fit its decision that notice had to be given five days before the hearing and not five days before instituting the action. Fortunately, this odd construction of the statute is not the sole basis of the decision of the court in favor of the agricultural society. The court properly held that the landowners by their general appearance waived any defects with respect to notice. The concurring opinion by Judge Hornbeck is acceptable because it is based upon waiver of notice.

## *State Authorities*

The title of this subdivision might have been "turnpikes." But turnpikes are only one form of state authority and therefore a broader title seemed desirable because of the possibility of future litigation involving state authorities other than turnpikes which will merit consideration in the annual survey.

The Ohio Supreme Court on *State* ex rel *Ohio Turnpike Commission v. Elyria*[29] held that the City of Elyria has no duty under Ohio statutes to determine at the request of the Turnpike Commission new locations which the city deems best for the relocation of a public road and water lines which the Turnpike Commission found had to be relocated.

## *Water Rights*

It is possible that Ohio may adopt the theory of reasonable use with respect to surface water. The rule of reasonable use is superior to either the civil-law rule that an owner of land must allow surface water to drain on to his land in its usual and natural way or the common-law rule, sometimes

[28] 96 Ohio App. 6, 121 N.E.2d 118 (1953).
[29] 161 Ohio St. 363, 119 N.E.2d 297 (1954).