

Volume 8 | Issue 3

1957

Real Property

Marshall I. Nurenberg

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

Recommended Citation

Marshall I. Nurenberg, *Real Property*, 8 W. Res. L. Rev. 353 (1957)
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol8/iss3/27>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

REAL PROPERTY

Adverse Possession — Auditor's Deed

An important and practical construction of Ohio Revised Code section 5723.12¹ was rendered by the court of appeals in *Mogren v. A.P. Investment Co.*² The defendant purchased certain land from the county auditor pursuant to the provisions of this section. The plaintiff claimed an open, notorious and adverse use of a private drive on defendant's land for a period in excess of the preceeding twenty-one years. The action brought by plaintiff was to enjoin defendant from obstructing plaintiff's use of the drive. Taxes became delinquent in 1930, but the land was not forfeited to the State of Ohio until 1950.

In an appeal on law and on fact, the court of appeals reversed a decree for plaintiff and entered a decree for the defendant. The court noted that under the statute an auditor's deed is free of all easements and covenants running with the land that were not created prior to the time the taxes or assessments *became due and payable*. The effect of this decision is to create a statutory exception to the common law rules of adverse possession, inasmuch as nonpayment of taxes has the effect under this statutory construction of stopping all adverse possession of less than the required twenty-one years. This decision also has the effect of vesting the auditor with authority to convey a better title than the legal titleholder prior to forfeiture, inasmuch as such titleholder could not, of course, wipe out rights of an adverse user of his land merely by a conveyance.

Appropriation Proceeding — Damages

A novel and yet practical claim for damages in an appropriation proceeding was before the court of appeals in the case of *In re Appropriation of Easements For Highway and Slope Purposes*.³ The plaintiff operated a gas station adjacent to the highway. Certain portions of plaintiff's land were condemned for highway improvement and specifically to convert the highway into a divided highway with median stripes. The effect of the

¹ " the conveyance of such real estate by the auditor shall extinguish all previous title and invest the purchaser with a new and perfect title, free from all liens and encumbrances, except such easements and covenants running with the land as were created prior to the time the taxes or assessments became due and payable." (Emphasis added).

² 131 N.E.2d 620 (Ohio App. 1956).

³ 137 N.E. 2d 595 (Ohio App. 1955). Motion to certify the record was overruled on December 21, 1955.

improvement was to divert automobile traffic away from plaintiff's property. The trial court gave certain special charges before argument and refused others which had the effect of permitting the jury to award damages to the residue by reason of diverted vehicular traffic. This the court of appeals held to be error as "the owner of land abutting on a highway has no property right in the continuation or maintenance of the flow of traffic past his property."⁴ This decision certainly points up an important drafting consideration in the sale or lease of a business dependent upon transient highway traffic when one considers the trend toward limited access highways.

Covenant to Build Not Merged in Deed

A commendable decision was rendered by the court of appeals in *Galvin v. Keen*.⁵ Plans and specifications were incorporated in a contract to purchase a house under construction. After completion, a deed was executed and the consideration paid, following which the purchaser went into possession. Defective construction of the underground drainage system and inferior materials in the subfloor⁶ resulted in a wet basement which was corrected upon additional expenditures by the purchaser. The appeal claimed error in directing a verdict for the defendant in a damage suit on the theory of defendant that the execution of the contract merged into the deed. The court noted a long standing decision by the Supreme Court of Ohio⁷ that a covenant to sell in a land contract is merged in the deed and executed by it. The court, however, held that covenants in such a contract to build or repair are of a nature entirely different and distinct from the covenant to sell the land, and there is no justification for merging these covenants with the execution and delivery of the deed. The court noted, however, that acceptance of the deed waives a claim for patent defects. Of course, whether defects are patent or latent is a jury question in most cases. The obvious caveat to the counselor is to suggest that the construction be inspected by an expert, or that warranties be incorporated into the contract before the acceptance

⁴State *ex rel.* Merritt v. Linzell, 163 Ohio St. 97, 126 N.E.2d 53 (1955) especially syllabus 3.

⁵100 Ohio App. 100, 135 N.E.2d 769 (1954). Motion to certify the record was overruled on March 9, 1955. This decision is also discussed in the CONTRACTS section, *supra*.

⁶Materials used were not in conformity with specifications of contract.

⁷Brumbaugh v. Chapman, 45 Ohio St. 368, 13 N.E. 584 (1887). It is important to note that the decision of *Birnbyer v. Lehman*, 19 Ohio N.P. (n.s.) 206 (1916) directly in point for the defendant was rejected. The decision in the *Galvin* case does not attempt to overrule the *Brumbaugh* case, but merely distinguishes it and limits it to its facts.

of the deed. The judgment of the trial court was reversed and the cause remanded on the question as to whether the defects complained of were latent or patent.

Property Rights — Filled Land

An important decision to lawyers concerned with the property rights of filled in land along Lake Erie was rendered by the court of appeals,⁸ and affirmed by the Supreme Court of Ohio.⁹ The City of Cleveland purchased certain land incident to the construction of a freeway (Memorial Shoreway). The deed of transfer was subject to plaintiff's lease. The land possessed by plaintiff under its lease from the grantor to the city was filled in land along the shore of Lake Erie. The freeway construction involved condemnation of a portion of plaintiff's leasehold. The trial court refused to permit the city to introduce evidence that the land in question was filled and refused to instruct the jury that as to such filled land the plaintiff could have no claim because all such land is owned by the State of Ohio for the people.¹⁰ The theory of the trial court was that the city was estopped from asserting this defense when it accepted the deed subject to plaintiff's leasehold rights.¹¹ The court of appeals disposed of this argument by noting that a lease of such land for private purposes constitutes a breach of the trust of the State of Ohio and is thereby void ab initio. The issue as to the character and make up of the land in question was therefore material and the rulings of the trial court were consequently prejudicially erroneous.

Both the decision of the court of appeals and the Supreme Court contain excellent discussions on damages allowable for such condemnation. Assuming that the land in question was not filled in thereby entitling plaintiff to damages, further error was held to have been committed by the trial court in permitting the jury to award damages for loss of profits¹² and inconvenience of travel occasioned by being required to follow a more circuitous route due to the completed highway improvement.¹³

⁸ Cleveland Boat Service v. Cleveland, 130 N.E.2d 421 (Ohio App. 1955).

⁹ 165 Ohio St. 429, 136 N.E.2d 274 (1956).

¹⁰ State *ex rel.* Squire v. Cleveland, 150 Ohio St. 303, 82 N.E.2d 709 (1948), especially syllabus 1.

¹¹ Cleveland Boat Service v. Cleveland, 130 N.E.2d 421, 425 (Ohio App. 1955).

¹² *In re* Appropriation by Supt. of Public Works, 155 Ohio St. 454, 99 N.E.2d 313 (1951) "As a rule, profits from commercial businesses on premises can not be shown in an appropriation proceeding for the reason that such profits are too speculative, depending as they do upon the acumen and skill of the one who carries on the business, but, assuredly, it is proper to show the kinds of businesses to which premises are adaptable."

¹³ State *ex rel.* Merritt v. Linzell, 163 Ohio St. 97, 126 N.E.2d 53 (1955), especially syllabus 2.

One might, however, question the soundness of the holding of the court of appeals that the damages awarded were manifestly excessive, because greatly in excess of the cancellation clause of the lease setting forth the price to be paid lessee for permanent improvements installed in the event of termination of the leasehold. The court of appeals expressly rejected the city's argument that as a purchaser by deed, the only action against it should be for interference by it of the peaceful enjoyment of the land leased.¹⁴ Instead the court accepted the theory of plaintiff that the action was in reality one for damages for the appropriation by the city of part of its leasehold. Under such circumstances it is hard to see why the contractual evaluation of damages between lessor and lessee should enter into the verdict of the jury. The opinion of the Supreme Court contains no comment on this point.

Priority of Liens

A problem bound to plague lawyers in the field of creditors rights was resolved in the case of *Southern Ohio Sav. Bank & Trust Co. v. Bolce*.¹⁵ The property was sold by judicial sale. The proceeds were insufficient to pay federal tax liens, state taxes owing, mortgagees and perfected judgment lienholders. Section 3672 of the U.S. Revenue Code as construed by the United State Supreme Court¹⁶ subordinates the federal lien to that of the mortgagee and judgment lienholder, but as to all other liens, including that to the state of taxes, the federal lien is superior. Ohio Revised Code section 5719.25, however, vests the State of Ohio with first rights to the proceeds of a judicial sale of realty.¹⁷ This puzzler in priorities was resolved with a decision that the interests of the mortgagee and judgment creditor must be set out first in accordance with the federal law, and the balance of the fund then must be used to satisfy the federal lien. However, the mortgagee and judgment creditor must then pay out of such fund a sum sufficient to satisfy the lien of the State of Ohio before being entitled to retain any proceeds. Needless to say, if the fund set out to the mortgagee and judgment creditor are less than the lien

¹⁴ The deed was quitclaim not warranty.

¹⁵ 165 Ohio St. 201, 135 N.E.2d 382 (1956) See Note, 8 WEST. RES. L. REV. 89 (1956)

¹⁶ *United States v. City of New Britain*, 347 U.S. 81 (1954).

¹⁷ "If real estate is sold at judicial sale the court shall order that the taxes, penalties, and assessments then due, and interest thereon, which are a lien on such land or real estate at the time of the sale, be discharged out of the proceeds of such sale. "