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Real Property

Marshall I. Nurenberg

REAL PROPERTY

It seems hard to imagine that the common-law anachronism, the fee tail estate, can still rear its hoary head in a modern conveyance. Such was the case in *Guida v. Thompson*,[1] in which a warranty deed was to "*A* and *B*, and the heirs of their bodies," whereas the granting, habendum, and warranty clauses of the standard printed deed form referred to "heirs and assigns," with the words "and assigns" crossed out. *A* and *B* subsequently conveyed in fee simple. Prior to said conveyance, the original grantor executed a quit claim deed to *A* and *B* in fee simple, which stated that the earlier deed inadvertently added after the names of the grantees the following words, "and the heirs of their bodies." The suit was for a declaratory judgment to construe the various deeds and estates acquired.

The court construed the original deed as vesting in the grantees thereof a fee tail estate. The grantor thereupon was divested of all interest in the premises except a possibility of a reverter.[2] The second conveyance by the original grantor merely transferred his possibility of a reverter and could not serve to disentail the estate originally conveyed. Furthermore, the expression of intention contained in the second deed could not serve as parol evidence[3] to aid in construing the original deed because the court held that the language in the original deed was unambiguous. Obviously, *A* and *B*, as the original donees in tail, could not convey a fee simple,[4] but at best a defeasible fee simple.[5]

It might have been possible for the trial judge to declare the original deed to be a fee simple absolute conveyance,[6] which was the obvious intention of the original grantor; regardless, the involved fact situation of the case presents an obvious caveat to the draftsman. The original scrivener is unidentified, and one can only hope that the entanglements which followed justify the current statute.[7]

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1. 160 N.E.2d 153 (Ohio C.P. 1957).

2. Statute *de donis* of Westminster 2, 13 Edw. 1, ch. 1.

3. Thomas v. Thomas, 108 Ohio App. 193, 161 N.E.2d 416 (1958), held that a document written by the grantor subsequent to the execution of the deed and purporting to impress a trust upon the property conveyed, which was in contradiction to testimony, was not the sufficient proof necessary to establish a trust on the property. See also discussion in *Trusts* section, p. 443 *infra*.

4. Pollock v. Speidel, 17 Ohio St. 439 (1867), especially the third paragraph of the syllabus.

5. In this case defeasible only by the claim of the heirs of the body of the donee in tail on the latter's death if there be such heirs, the reverter of the grantor having been conveyed. If the later conveyance was intended to disentail the estate rather than to convey the grantor's reverter, the grantor should have advised the grantee to proceed under the disentailing statute of Ohio, OHIO REV. CODE § 5303.21.

6. Collins v. Collins, 40 Ohio St. 353 (1883).

7. OHIO REV. CODE § 317.111 (Supp. 1959).

The Ohio Supreme Court decision in *Bove v. Giebel*[8] is of value in pointing up the current court philosophy in construing deed restrictions. The various sublots of a subdivision were restricted to use "for residence purposes only." The defendants purchased a six-acre tract adjoining, but outside of, the division, and purchased a twenty-five foot strip of a sublot within the subdivision to be used as a driveway to and from the six-acre tract. Both the common pleas court and the court of appeals enjoined defendants from so using the twenty-five foot strip. The judgment of the court of appeals was reversed. Judge Taft, applying the well recognized rule that deed restrictions are to be construed strictly against the restriction,[9] held that "for residence purposes only" does not necessarily mean for residence purposes *in the subdivision* only.

Condemnation Cases

Each annual Survey of Ohio real property law of necessity requires consideration of condemnation cases. Without question the current highway development programs, inevitably followed by utility expansion programs, make an understanding of condemnation principles and procedures a must for the modern practitioner. Although there is nothing new in the case of *Ohio Edison Company v. Gantz*,[10] it is a commendable decision on the fundamentals of the law governing this class of cases.

The action was by the utility to appropriate an easement for an electric transmission line. The appeal considered the usual grounds of error: failure to name necessary parties;[11] failure to prove disagreement as to compensation;[12] and failure to prove necessity.[13]

With regard to the element of "necessity," the opinion notes that what the condemning plaintiff is required to prove is a reasonable necessity, rather than an absolute necessity. Furthermore, where two routes are possible, in the absence of an abuse of discretion, the appropriating agency is at liberty to select the route it will follow.

Most condemnation cases are concerned with valuation, rather than an attempt to restrain or defeat the condemnation proceeding. It is, therefore, interesting to note that evidence as to the most valuable use[14] of the land involved is not to be refused merely because such

8. 169 Ohio St. 325, 159 N.E.2d 425 (1959).

9. Loblaw, Inc. v. Warren Plaza, 163 Ohio St. 581, 127 N.E.2d 754 (1955); Ritzenthaler v. Pepas, 107 Ohio App. 385, 159 N.E.2d 472 (1958).

10. 159 N.E.2d 477 (Ohio Ct. App. 1958).

11. Ohio Rev. Code § 2709.06.

12. Ohio Rev. Code § 2709.03.

13. Giesy v. Cincinnati, W & Z Ry., 4 Ohio St. 308 (1854).

14. Sowers v. Schaeffer, 155 Ohio St. 454, 99 N.E.2d 313 (1951), especially the third paragraph of the syllabus. On valuation, it has been held that the resolution of the Director of Highways filed in accordance with Ohio Rev. Code § 5519.01 is admissible in evidence as an admission against the Director. See *In re* Appropriation of Easement for Highway Purposes, 107 Ohio App. 58, 156 N.E.2d 334 (1958).