Case Western Reserve Law Review

Volume 12 | Issue 3

1961

# Real Property

John H. Wilharm Jr.

in the safety deposit box from the time he delivered the key to his brother to the date of his death.

As to the gift theory, the court found that there was a clear donative intent but there was no delivery, and, therefore, the gift failed. The delivery of the key, in and of itself, was not a sufficient delivery, and the fact that the decedent himself entered the box on several occasions indicated that he did not divest himself of such control as to make a sufficient delivery.

JOSEPH KALK

# REAL PROPERTY

Plaintiff, in *New Way Family Laundry, Incorporated v. City of Toledo,*[1] brought suit to recover damages for interference with ingress to and egress from its business. The City of Toledo and the State of Ohio had constructed a concrete divider strip in the middle of the street upon which New Way's property abutted. The divider prevented motorists from making left turns into the property and necessitated a circuitous route, of one or two miles in length, in order to reach the property from the easterly lane (the one furthest from the property). It should be noted that there was no change in the grade of the street and no appropriation of plaintiff's property.

The supreme court, with very little discussion,[2] reversed the judgments of the court of common pleas and the court of appeals, holding that an owner has no right to the continuation or maintenance of the flow of traffic past his property and that elimination of turns across traffic into his property is not an actionable interference with the right of ingress and egress.

*Village of Blue Ash v. City of Cincinnati*[3] involved an unusual situation in which the Village of Blue Ash attempted to block the proposed appropriation of a part of one of its streets by the City of Cincinnati. The city was attempting to acquire land for a feeder airport and needed this property, even though it had already been dedicated to another public use. The court found that the operation of an airport is not a governmental function, but rather a proprietary function in the nature of a public utility. Therefore, the City of Cincinnati represented, in the condemnation proceeding, a body in the nature of a public utility. Also,

1. 171 Ohio St. 242, 168 N.E.2d 885 (1960).

2. The majority of the opinion is quoted from State *ex rel.* Merritt v. Linzell, 163 Ohio St. 97, 126 N.E.2d 53 (1955).

3. 166 N.E.2d 788 (Ohio C.P. 1960).

the court emphasized that the taking would be for a second public use which would destroy the first, *i.e.*, the roadway.

The court, considering the two aforementioned factors, decided that there was no express or implied authority to appropriate the public property and the condemnation of the roadway would be an unreasonable interference with a public easement already in existence. Therefore, Blue Ash prevailed and the city could not proceed with the condemnation.

The question of what constitutes the taking of property was presented to the supreme court in *State ex rel. Schiederer v. Preston.*[4] Relator instituted a mandamus action in that court to require the Director of Highways to formally appropriate her property rights allegedly taken when the grade of the street upon which her property abutted was raised eighteen feet. The petition alleged that raising the grade would interfere with the property owner's view over the street and destroy the relative harmony of the street and the land adjacent to it. There was no allegation that relator's right of access to her property had been interfered with. The court held that such a change of grade did not constitute a taking of relator's property. In so holding, the court refused to equate the right of access to a street, which has been held to constitute a taking,[5] with the owner's right to an unobstructed view.

In its opinion, the court was careful to distinguish two earlier cases which permitted recovery, *Village of Port Clinton v. Fall*[6] and *Cohen v. Cleveland.*[7] The appropriation in the *Port Clinton* case was for the construction of a railroad to be elevated above the grade of the street, hence, the taking was not for a street or highway purpose and was therefore actionable. In the *Cohen* case, the relief sought was for the interference with light and air and for continuous noise and jarring. The court, in the *Schiederer* opinion, emphasized that it should not be inferred that "the impairment of light and air would be sufficient for the award of damages,"[8] because in the *Cohen* syllabus the two different elements, impairment of light and air *and* noise and jarring, were stated conjunctively.

A word of caution was given by the Common Pleas Court of Franklin County in *Ohio Fuel Gas Company v. Sun Oil Company.*[9] Plaintiff sought injunctive relief against the Sun Oil Company which was constructing a service station on property it leased from a third party. Years before the defendant leased the premises, plaintiff had obtained, and

4. 170 Ohio St. 542, 166 N.E.2d 748 (1960).
5. State *ex rel.* McKay v. Kauer, 156 Ohio St. 347, 102 N.E.2d 703 (1951).
6. 99 Ohio St. 153, 124 N.E. 189 (1919).
7. 43 Ohio St. 190, 1 N.E. 589 (1885).
8. 170 Ohio St. 542, 547, 166 N.E.2d 748, 752 (1960).
9. 164 N.E.2d 922 (Ohio C.P. 1958).

recorded, an easement from the owner for its gas mains which supplied about forty per cent of Columbus's natural gas supply. The court, primarily on the basis of public policy, granted the injunction. Although plaintiff had reserved the right of ingress and egress to its lines, the court was not impressed with the added burden which having them covered with several inches of concrete would impose. The basic consideration was the safety factor. The court reasoned that the risk of fire and explosion which would be created by having large amounts of gasoline near the high pressure gas mains was more than the public should bear. It felt that the real party in interest in this case was not the Ohio Fuel Gas Company but rather the thousands of consumers of natural gas who would be affected if there were a disruption of service. It should be noted that apparently there was very little evidence offered on the safety aspects of this case, although the court did cite several cases dealing with the paramount interest of such a public utility.

In the case of *Mentor Harbor Yachting Club v. Mentor Lagoons, Incorporated,*[10] the plaintiff, owner of land adjacent to a channel into Lake Erie, brought suit to enjoin the defendant and other property owners from using this channel for access to Lake Erie. The defendants owned land adjacent to lagoons which were being developed for residential and recreational boating purposes. The lagoons were man-made extensions of the channel.

The gravamen of the lawsuit, according to the supreme court, was whether the watercourse was a naturally navigable one. If a channel is naturally navigable, it is public, and the plaintiff could not prevail. In determining this question, the court relied on its own 1955 decision in *Coleman v. Schaeffer.*[11] In the *Coleman* case, the court "extended the criteria for determining navigability beyond the so-called 'commercial usage' test"[12] announced in the earlier supreme court decision of *East Bay Sporting Club v. Miller.*[13] Suitability of a waterway for recreational uses is thus as important a factor in determining navigability as commercial suitability. The affirmation of the *Coleman* rule and modification of the *East Bay* rule was necessary to defendant's case since the uses it contemplated did not include any of a commercial character. The court very clearly expressed its opinion that the use of Ohio's waterways for pleasure is just as important as their use for commercial purposes.

The court had little difficulty in determining the second important question, *i.e.,* was the channel *naturally* navigable. The evidence showed that at times a sandbar would appear, as a result of the action of the pre-

10. 170 Ohio St. 193, 163 N.E.2d 373 (1959).
11. 163 Ohio St. 202, 126 N.E.2d 444 (1955).
12. 170 Ohio St. 193, 199, 163 N.E.2d 373, 378 (1959).
13. 118 Ohio St. 360, 161 N.E. 12 (1928).

vailing winds and shifting sands, which required dredging to keep the channel open. The court had held in the *East Bay* case that a watercourse need not flow continuously as long as it had a well defined course and banks. Therefore, because this channel was suited for recreational uses and had a definite course and banks, it was a naturally navigable — therefore public — channel, and the plaintiff was not granted the relief it sought. This decision, while not advancing any new law, does clarify the court's position on questions which will become more important throughout the state as the number of pleasure boat owners increases.

While the law relating to the drainage of surface water did not undergo any major changes, two cases emphasize the fine distinctions that exist in this area. The prime factor responsible for this problem is the building of houses, apartments, commercial buildings, roads, and parking lots which collect rain water rather than allowing it to percolate gradually into the bare ground. The plaintiff golf club, in *Oakwood Club v. City of South Euclid,*[14] sought an injunction to prevent the city from draining surface waters into a natural stream from its storm sewers. Whenever sustained rains fell on the area, the stream, swelled by the storm sewers, would overflow onto the golf course. This caused, not only flooding, but also erosion and permanent damage to the turf. The court of appeals held that a municipal corporation could construct storm sewers to drain into a natural stream, regardless of the effects, such as flooding, when such stream was the natural outlet for the surface waters in that area.

The court, in the *Oakwood* case, relied primarily on the supreme court's decision in *Mason v. Commissioners of Fulton County,*[15] which is one of a series of Ohio cases[16] announcing the rule as aforesaid. The court pointed out that the Supreme Court of Ohio had never adopted the "capacity of the stream" rule which allows drainage into a natural stream only in the amount that can be carried off.

The decision in the *Oakwood* case can be contrasted to that in *Johnson v. Goodview Homes - 1, Incorporated.*[17] Defendant had constructed apartments and parking areas in an urban area on land higher than and adjacent to plaintiff's. The court held that plaintiff was entitled to damages and an injunction to restrain defendant. The significant difference between *Oakwood* and *Johnson* is that in the *Johnson* situation, the defendant had increased the flow in *other* than a natural channel or waterway. Therefore, the existence and use of a natural stream or water-

14. 165 N.E.2d 699 (Ohio Ct. App. 1960). See also discussion in *Torts* section, p. 576 *infra.*

15. 80 Ohio St. 151, 88 N.E. 401 (1909).

16. City of Hamilton v. Ashbrook, 62 Ohio St. 511, 57 N.E. 239 (1900); Springfield v. Spence, 39 Ohio St. 665 (1883).

17. 167 N.E.2d 132 (Ohio C.P. 1960).