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Real Property

Marshall I. Nurenberg

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REAL PROPERTY

APPROPRIATION CASES

For all practical purposes appropriation cases in 1961 proved to be the bread and butter cases in which real property law was involved. Despite the voluminous litigation already in this particular field, refinements or new points are constantly cropping up. The purpose of the instant survey is to note the more important or practical points for those practitioners who, although not specializing in this field, may have occasion during the forthcoming year to be involved in appropriation proceedings.

Conflicting Claims of County and Village to Same Tract

A somewhat unusual situation was involved in the case of *Village of Richmond Heights v. Board of County Commissioners*.¹ This was an appeal on law and fact to the court of appeals from an order of the court of common pleas granting to the village a partial injunction to enjoin the county from appropriating certain lands acquired by purchase by the village, which lands were desired by the county for airport expansion. The case involves the unique fact situation of two public bodies both interested in the same tract of land for allegedly legitimate public purposes. The village with knowledge of the intention of the county to appropriate the tract in question for necessary expansion of county airport facilities acquired the property by purchase for the erection of certain municipal buildings, the remainder of the tract to be used for recreational purposes at some undetermined time in the future. The county then sought to appropriate this tract from the village, as it was absolutely necessary for the proposed expansion of the airport facilities and no other land was available for this purpose. The court of common pleas enjoined the county from appropriating those portions of the tract which were legitimately necessary for the proposed construction of municipal buildings, but as to the remainder of the lands allegedly designated for village recreational purposes, these were held subject to appropriation by the county. The order of the court of common pleas was affirmed by the court of appeals.

Although appropriation proceedings are statutory in nature, the majority opinion decided the case on equitable grounds. Specifically, the court held that although the general rule may be that, when each public authority has the right to acquire the property in question, the first in time is first in right, an exception will be made under the so-called rule of relative convenience. Under the facts of the case, it was obvious that

1. 112 Ohio App. 272, 166 N.E.2d 143 (1960).

the real reason the village had acquired such a large portion of property was to make it impossible for the airport to expand. The proposed recreational purposes were nebulous in nature, and in any event could easily be carried out through the use of other lands which would be available to the village either by purchase or appropriation. On the other hand, a heavy burden would be imposed upon the county if its move to condemn the property were thwarted as other lands for its purposes were not available, and an inability to acquire the property in question would in effect render the airport useless. Basing its decision on equitable principles, the court held that the county may acquire by condemnation a tract purchased by the village where necessary for expansion of airport facilities, and where the village could show no clear use of the property for present municipal purposes.

A dissent by Judge Guernsey asserted that the majority opinion used equitable principles to decide the case rather than restrict itself to statutory construction and interpretation in what was essentially a statutory proceeding. However, Judge Guernsey did not dissent with the result. It will be interesting to note in future cases to what extent appellate courts in Ohio are willing to apply general equity doctrines and principles to appropriation cases.

Appropriation by School Board — Statutory Construction

A somewhat interesting, albeit literal, example of statutory construction was involved in *Sterkel v. Mansfield Board of Education*.² This was an action by a property owner outside of the territorial limits of the school district involved to enjoin a local school board from appropriating the property in question. Although the lower courts had decided in favor of the board of education, the Supreme Court of Ohio took the position that the injunction should have been granted. The court noted that under the provisions of Ohio Revised Code section 3313.37, a school district may "purchase" or "lease" property within or *without* the territorial limits of the district. However, Ohio Revised Code section 3313.39, which is the statutory basis for appropriation of land by a board of education, does not contain express language authorizing such proceedings outside the territorial limits of the district. A question then arose as to whether these two sections of the Code were to be construed *in pari materia* through the use of the word "purchase."

The supreme court interpreted the word "purchase" as meaning a voluntary transfer of property through negotiations and not the involuntary taking of the property through condemnation. The next move will be up to the legislature to decide whether the authority of a school

2. 172 Ohio St. 231, 175 N.E.2d 64 (1961).

district to appropriate property should be extended by statute beyond the territorial limits of the district.

Accrual of Interest on Appropriation Judgments

Two other cases worthy of note in this field dealt with the accrual of interest on appropriation judgments. The case of *In re Appropriation of Easement for Highway Purposes*³ involved a judgment by agreement of the parties, that is, the state and the property owner. It was held that interest on such judgment accrues from the date of journalization of the judgment. In this respect a judgment in appropriation proceedings by agreement is to be treated exactly the same as a judgment following a jury verdict assessing the value of the property.

In another court of appeals case, *In re Appropriation of Easement for Highway Purposes*,⁴ the state, desiring to stop the running of interest pending the outcome of its appeal, paid the judgment into court and then perfected an appeal. Again, the court applied the general rule holding that interest in an appropriation proceeding judgment runs until the judgment is finally paid. The state could not stop the running of interest merely by paying the judgment into court, but must pay it to the property owner.

DEED CONSTRUCTION CASES

Deed Restrictions

A novel but practical problem in covenant restriction construction was involved in *Werner v. Sofios Construction Company*.⁵ This opinion by Judge McCrystal, of the Court of Common Pleas of Erie County, concerned a deed restriction which prohibited the erection of a prefabricated house on the property described. In the case involved, a specific house was designed for the particular property, but portions of the house were constructed in a shop off the premises and transported to the premises for assembly. Judge McCrystal held that such a house is not "prefabricated" within the meaning of the deed restriction. He further noted that his careful research of the law had failed to uncover any cases concerning this problem.

The important factual consideration was the specific design of the house in question for the property rather than an attempt to erect some form of mass-produced house which had been manufactured well before the purchase of the property in question. The court noted there could

3. 112 Ohio App. 269, 176 N.E.2d 155, *appeal dismissed*, 171 Ohio St. 399, 171 N.E.2d 513 (1960).

4. 112 Ohio App. 459, 176 N.E.2d 314 (1960).

5. 176 N.E.2d 870 (Ohio C.P. 1961).

be no real complaint as to the construction of the particular portions of the house in a shop off the premises where no complaint of faulty workmanship was involved, and admittedly if the very work involved had been done on the premises, no complaint would be lodged. The following dictum by Judge McCrystal may prove to be the basis of much future litigation:

Workmen who shop construct components for a particular house, for a particular site, for a particular owner would, in most cases, be able to enforce a mechanic's lien against the premises if not paid for their labor.⁶

A prayer for a decree enjoining future construction was denied.

Determinable Fee or Fee Simple Absolute

A good caveat for the scrivener is demonstrated in the case of *PCK Properties, Incorporated v. City of Cuyahoga Falls*.⁷ This was an action in declaratory judgment to have certain land donated to the City of Cuyahoga Falls be declared as owned by the next of kin of the donor, which next of kin had conveyed their rights to plaintiff herein. The original deed to the city contained language that the donor

... does hereby grant ... to said grantee so long as used as hereinafter set forth ... for the purpose of creating and maintaining a public park to be known as and called Fields Park.⁸

The court of appeals found that the city did maintain the land as a park but did not name the park "Fields Park" as required by the deed. Nevertheless, the court determined as a matter of law that the deed conveyed a fee simple absolute to the city. The deed did not limit the estate conveyed to a determinable fee despite the use of the phrase "so long as" in the granting clause. Although such phraseology customarily denotes a determinable fee, the defect in the instant deed, according to the court, was that no specific reverter was set forth in the deed. In this connection the court of appeals stated in dictum an interesting observation concerning the alienability of a possibility of reverter.

The lower court had held that even if the deed be construed as a determinable fee with a possibility of reverter in the next of kin, such possibility was destroyed upon attempted assignment or sale to the plaintiff. The court of appeals, however, noted that this common-law doctrine had been obviated in Ohio by the provisions of Ohio Revised Code section 2131.04 which states:

6. *Id.* at 871.

7. 112 Ohio App. 492, 176 N.E.2d 441 (1960). See also discussion in *Future Interests* section, p. 485 *supra*.

8. 112 Ohio App. 492, 493, 176 N.E.2d 441, 443 (1960).

Remainders, whether, vested or contingent, executory interests, and *other expectant estates* are descendible, devisable and alienable in the same manner as estates in possession. (Emphasis added.)

By construing a possibility of reverter or right of re-entry as an "expectant estate," the court held that, if the language within the deed was sufficient to create a possibility of reverter, it would fall within the meaning of the above statute. Thus the lower court's decision was sustained only because the court of appeals held that the language in the deed was insufficient to create a possibility of reverter.

The court of appeals likewise considered whether the language of the deed would create a conveyance in fee on a condition subsequent. Such construction, however, was held inapplicable for the simple reason that the deed failed to spell out any right of re-entry. The only construction left, therefore, was that of a fee simple absolute.

In this writer's opinion, the case is a close one and might well have been construed as a determinable fee had only private interests been involved. There is language in the opinion of the court of appeals noting the great reluctance of courts generally to defeat the property interests of a municipal corporation where the public interest is involved, and it seems quite obvious that especially in such close cases, great care must be exercised in the drafting of deeds if a conveyance by fee simple absolute is not intended by the grantor.

Conditions in Contract Not Included in Deed

In *Counts v. Baltimore and Ohio Railroad Company*⁹ the Court of Appeals of Ross County was confronted with a petition to enforce a condition imposed by the vendor in a contract for the sale of a right of way but not specifically incorporated into the deed conveying the right of way. The condition in the contract required the vendee to maintain adequate clearance of an undercrossing so that the vendor could drive his cattle across the vendee's right of way. While no reference to this provision was included in the deed, the contract itself was recorded. The vendor's farm, which the vendee's right of way divided, was conveyed through successive grantees to the plaintiff. The vendee's right of way was conveyed through successive grantees to the defendant. Plaintiff's petition for a mandatory injunction to require defendant to maintain the undercrossing alleged that the defendant ten years before had cleared out the debris but that of late the debris had accumulated again, water had seeped in, and the undercrossing was rendered impassable.

The court of appeals rejected defendant's contention that the recording of the contract did not put defendant on notice of a duty to maintain the undercrossing — apparently for two reasons. First, prior attempts

9. 177 N.E.2d 606 (Ohio Ct. App. 1961).