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Real Property

John H. Wilharm Jr.

Robert J. Shoup

breaking into of premises is contrary to public policy and, therefore, void. Accordingly, it was not a valid defense nor a plea in mitigation to an action for trespass. The judgment for Hileman was affirmed.

JOSEPH KALK

REAL PROPERTY

GENERAL DEVELOPMENTS

Outside of the condemnation area, one Ohio Supreme Court case reported in 1962 is worthy of mention. In *Manpower, Inc. v. Oakley Drive-In Theatre, Inc.*[1] the court drew a distinction between laboring upon defendant's project and furnishing labor for it. Plaintiff furnished laborers to work on defendant's building under a contract with defendant's prime contractor, Phillips. Plaintiff was not paid, although it paid all its employees. Subsequently it caused a mechanics lien to be filed against defendant's property and in this case sought foreclosure. The issue concerning the court was whether a contractor who furnished laborers for a project has any lien rights against the property improved under Ohio Revised Code section 1311.02. The court decided that plaintiff did not have any such lien rights. The court first determined that, according to the statutory definition or a judicial description, plaintiff could not qualify as a subcontractor. Further, it found that plaintiff was not a laborer. Therefore, it could not qualify for lien rights under Ohio Revised Code section 1311.02 which states that "every person who as a subcontractor, laborer, or materialman . . . has a lien . . . ."[2]

McInnish v. Sibit,[3] a case involving a common fact situation, decided ten years ago, was finally reported in 1962. Plaintiffs sought to enjoin defendant from using a portion of their property as his driveway. Plaintiffs unquestionably had title to the property. However, defendant sought to establish his right on the basis of a prescriptive easement. Clearly the claimant to such an easement has the burden of proof to establish such an easement. The court had no trouble with this proposition, but it did find a lack of Ohio authority on the degree of proof necessary. After examining Ohio case law and authorities from other jurisdictions on the issue, the court concluded that one endeavoring to prove a prescriptive easement must do so by clear and convincing evidence. In the case at bar, the court held that there was "no clear show-

1. 173 Ohio St. 45, 179 N.E.2d 922 (1962).
2. *Id.* at 47, 179 N.E.2d at 924.
3. 114 Ohio App. 490, 183 N.E.2d 237 (1953).

ing" that defendant and his predecessors in title had openly and continuously used the drive for a period long enough to establish an easement by prescription.

The effect of a restrictive covenant limiting lots to "residence purposes only" was the primary issue in *Swineford v. Nichols.*[4] The action was for a permanent injunction to restrain defendants from using a part of their home as a commercial beauty parlor. All deeds covering the allotment, including defendants', contained the restriction, "said premises shall be used for residence purposes only."[5] Furthermore, there was no question that defendant Margaret A. Nichols was a licensed cosmetologist, had a shop license for the practice of this vocation, and had obtained a permit from the Zoning Board of Appeals. The court assumed that the permit issued by the Zoning Board of Appeals was valid and dealt only with the issue of the deed restriction.

The court indulged in a detailed examination of the facts and found, *inter alia,* that defendants had a single family residence, which had not been altered in appearance and did not have a commercial front. The court found that the commercial activities were confined to one room (formerly a "family room") and that there was no parking problem or annoyance to the neighbors. The court stated that there was no substantial evidence that the operation had depreciated the property in the allotment. The court concluded that defendants had not violated the deed restriction except for the advertising they had undertaken. The defendants were allowed to continue their operation. However, they were enjoined from advertising or expanding such operation and from employing persons not residents of the household.

An opinion from the Common Pleas Court of Tuscarawas County, *McCullough v. D. Waldenmeyer, Inc.,*[6] deserves note. The measure of damages for the breach by the vendor of a contract to sell real estate was the major issue in the *McCullough* case. Plaintiffs sought damages for defendant's failure to complete a contract for the purchase of a home to be constructed by defendant. The plaintiffs' evidence showed their liquidated damages as a down payment of $1,585.00, interest on it of $110.00, telephone installation of $15.00, loss of the bargain of $215.00, and interest of approximately $10.00. These items total $1,935.00, and the jury verdict was $2,650.00, or $715.00 more than the damages shown by the evidence. The question for the court, on a motion for a new trial, was whether the measure of damages in such a case would support this award of $715.00 over the amounts proved. The court, relying on some Ohio authority and a decision of the Supreme Court of Washington, held

4. 177 N.E.2d 304 (Ohio C.P. 1961).
5. *Id.* at 306.
6. 185 N.E.2d 806 (Ohio C.P. 1961).

that the jury, having been properly instructed, could award damages to plaintiffs for their "loss of time" in discharging their obligations under the contract without specific evidence of the value of the time.

Werner v. Guttman[7] was a suit between the owner of the fee and the holders of two ninety-nine year leases, renewable forever. The court was requested to determine which party was entitled to an $11,000.00 fire insurance payment. The lessees paid a ground rent and were required, by the terms of each lease, to maintain fire insurance. A fire partially destroyed a building and the insurance carrier paid the $11,000.00 to the lessees. Following this payment, the property was condemned by the state, and the parties agreed to a distribution of the award as between the fee holder and the lessees.

The court in determining who was entitled to the fire insurance proceeds, had to consider the interests of the parties. It found that the owners of the fee are in the position of a mortgagee and the insurance is in the nature of security for their rent. Furthermore, the owner is entitled to receive his rent, and nothing more. In this case, the fee holder received a sum representing his rents, as capitalized, from the condemnation proceeds. Therefore, the court held, he had been compensated for his property interest and the benefits of the security, *i.e.,* the insurance would accrue to the lessees.

The Court of Appeals for Cuyahoga County, in *Munn v. Horvitz*,[8] decided an important case involving drainage rights. Plaintiffs in the *Munn* case were residents of an area which the court described as the "Deer Creek Watershed." They sought to enjoin construction of a new large sewer system in their area. Plaintiffs alleged that there was an unnatural diversion of surface waters into their watershed and a consequential unnatural discharge of this water which caused damage to their property. There was evidence that this unnatural diversion had existed for some years prior to the construction of the new sewer. The court found that because of this use for years before, and even if there had been a diversion from one watershed to another, the municipal corporations involved acquired a prescriptive right to continue this use and the right to make necessary improvements (in this case expansion) in such a drainage system. The court denied plaintiffs' request to enjoin further construction of the sewer.

APPROPRIATION CASES

Significant cases continue to be decided by Ohio courts in the field of eminent domain. Several cases should be brought to the readers' attention.

7. 113 Ohio App. 553, 175 N.E.2d 114 (1959).

8. 184 N.E.2d 231 (Ohio Ct. App. 1962). See also Wilharm, *Survey of Ohio Law — Real Property,* 12 W. RES. L. REV. 546, 549 (1961).

In two cases[9] the Ohio Supreme Court held that an agency of the state had the power to purchase or condemn private property to provide an access road to other private property which had become landlocked as a result of construction of a turnpike or creation of a limited access highway. In the *May* case the court held that Ohio Revised Code section 5537.01 gave the defendant Turnpike Commission authority for such an acquisition. It further held that such a taking was a public use and therefore not violative of article I, section 19 of the Ohio Constitution. The court in the *Tracey* case found that the Director of Highways had authority by virtue of Ohio Revised Code section 5511.02 to appropriate land for such a purpose.

In *In re Appropriation of Easements for Highway Purposes*[10] the supreme court settled a conflict between two courts of appeals upon an important procedural matter. In this appropriation case the landowners filed a motion in the common pleas court for an extension of time and for leave to file an appeal. This motion was filed after the time prescribed by statute had elapsed. The common pleas court granted the motion and the appeal was filed. After the Director of Highways' motion to dismiss was overruled, he appealed and the court of appeals ordered the common pleas court to dismiss the appeal. This decision was in conflict with an earlier case,[11] and the supreme court resolved the question. That court held that the time allowed by statute for a landowner to file an "appeal" to common pleas court was a statute of limitations and compliance with it was mandatory in order to vest jurisdiction in the court.

Two points were raised in *In re Appropriation for Highway Purposes*.[12] The trial court sustained an objection to a question by counsel for the state upon voir dire as to whether the fact that the award would come from public funds would affect the amount the prospective juror would consider. Counsel was instructed to refrain from questions of this type. The court, after considering the entire voir dire, found that there had been no abuse of discretion. The court further held that the trial court may limit questions touching upon the fact that the sum to be paid by the state will come from tax revenues as an attempt to appeal to jurors' self-interest.

The court approved of a charge which allowed the jury to consider the cost of reproducing the building less depreciation, but also advised them that this was not fair market value which they had to determine.

The matter of jurors taking notes of the testimony of expert witnesses was thoroughly examined in *In re Appropriation of Easements for High-*

9. May v. Ohio Turnpike Comm'n, 172 Ohio St. 555, 178 N.E.2d 920 (1962); Tracey v. Preston, 172 Ohio St. 567, 178 N.E.2d 923 (1962).
10. 172 Ohio St. 338, 175 N.E.2d 512 (1961).
11. *In re* Appropriation for Highway Purposes, 104 Ohio App. 243, 148 N.E.2d 242 (1957).
12. 187 N.E. 2d 413 (Ohio Ct. App. 1962).

way Purposes.[13] On a motion for a new trial the court held that under the facts of this case, and in the absence of a showing that a party had been prejudiced, it was not error to permit the jurors to take notes on the valuation of lands and buildings. Appellants had requested that the jury be permitted to take notes. The court permitted this and instructed the jury that it was only to take notes as to the values of the property. The court went through an extensive examination of the Ohio cases touching on this point and also discussed several cases from other jurisdictions. Furthermore, it noted that in an appropriation case there is no burden of proof and no issue save the amount to be paid appellant. Considering these aspects of the case, the court found that this matter was within the trial court's discretion. In the absence of a showing of prejudice, the procedure would be permitted.

The question of who can "appeal" to a common pleas court for a jury trial pursuant to Ohio Revised Code section 5519.02 came before the court of appeals in *In re Appropriation of Easement for Highway Purposes.*[14] The lessee had filed such an "appeal." The common pleas court held that the lessee had no separate appealable interest and dismissed the "appeal." The court of appeals affirmed the dismissal holding that a lessee was not an "owner" under the statutes. The principal reason for this is that the question to be determined in such an "appeal" is the value of the real estate as a whole. The distribution of the award between the owner of the fee and any lessees is of no import nor concern to the State or the courts.

In an unreported case, a court of appeals held that an award somewhat lower than the state's lowest testimony could stand and that it was within the trial court's discretion whether to grant a new trial. The appeal of right was dismissed by the Ohio Supreme Court on the ground that no debatable constitutional question was presented.[15]

JOHN H. WILHARM, JR.
ROBERT J. SHOUP

13. 176 N.E.2d 881 (Ohio C.P. 1961).

14. 115 Ohio App. 48, 184 N.E.2d 256 (1961).

15. *In re* Appropriation of Easement for Highway Purposes, 172 Ohio St. 540, 179 N.E.2d 47 (1961). The Editor's note following the opinion in 18 OHIO OP. 2d 85 contains the facts of the case as reported in this article.