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# Real Property

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ful so as to support an action for conversion on the refusal to relinquish possession by the defendant. The court also held that plaintiff could bring the action as the owner of a one-half interest. But the court also held that plaintiff was limited in damages to one-half the value of the property and it was error to award the plaintiff the money value of the entire property.

The court of appeals in a recent case reiterated the common law rule that a bailee can sue for full damages and holds the overage as trustee for the owner.[13] This rule is unchanged by the real party in interest statute.[14]

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1957 proved to be a banner year for zoning ordinance litigation. *Krieger v. Cleveland*[1] represents a typical case. The area was zoned for residential two-family use. There were no non-conforming uses in the area. Plaintiff sought a mandatory injunction to compel the building commissioner to issue a permit for industrial use. Plaintiff advanced the ingenious argument that the court should anticipate expansion and consider future uses or needs in determining the constitutionality of the existing ordinance. The court rejected this argument and reiterated the test of constitutionality to be the existing facts.

The Supreme Court of Ohio refused to recognize a zoning ordinance as a vehicle to prohibit an existing undesirable, but nevertheless lawful, use of realty.[2] In the *East Fairfield Coal Co. v. Booth*[3] case plaintiff sought to enjoin the zoning inspector and township trustees from interfering with strip mining and to declare unconstitutional the zoning ordinance prohibiting strip mining anywhere in the township. Inasmuch as the ordinance was passed subsequent to the commencement plaintiff's operation under license,[4] the ordinance was held to be unconstitutional as to plaintiff. This case merits careful study as to the character of evidence to prove the unconstitutionality of a zoning ordinance.

An important factor in determining the unconstitutionality of zoning ordinances may be whether it is a township or municipal corporation ordinance. In *Yorkovitz v. Board of Township Trustees*,[5] plaintiff sought to enjoin enforcement of an ordinance declaring an airport to be a nuisance per se. The court regarded the general state statutes favoring the

[13] OHIO JUR. 2d, Bailments § 38 (1954).

[14] OHIO REV. CODE § 2307.05.

promotion of aviation as indicative of the public policy of Ohio,[6] and concluded that the General Assembly cannot be held to have delegated to township officials the authority to adopt zoning resolutions which are in contravention of general laws previously enacted by the General Assembly. The restricted authority of township trustees to enact such laws was a paramount factor in the decision.[7]

An important question of damages in condemnation proceedings was resolved in the case of *Queen City Realty Co. v. Linzell.*[8] The trial court refused to submit for consideration by the jury testimony as to the value of an existing leasehold, with four years to run. The Ohio Supreme Court affirmed and held that the compensation payable cannot exceed the value of the real estate as a whole even though the value of the leasehold interest, plus the value of the landlord's reversionary interest, should exceed the value of the real estate as a whole.[9] The court carefully distinguished between the value of an existing leasehold, which is inadmissible, and the reasonable rental value of the realty, which can be considered. Thus it is proper to have an expert testify as to the reasonable rental value of the property; such testimony tends to prove the reasonable value of the real estate as a whole.[10]

An everyday practical problem is the obligation owed a real estate broker who shows a house which is ultimately purchased by the prospect directly. The law is well established that a broker is entitled to a commission when he is a procuring cause of the sale. But the mere showing of a house does not amount to a procuring cause. In *Bauman v. Worley,*[11]

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[1] 76 Ohio L. Abs. 356, 143 N.E.2d 142 (Ohio Ct. App. 1957).

[2] For an excellent discussion of the constitutional issues pertaining to zoning ordinances, see Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Cleveland Trust Co. v. Village of Brooklyn, 92 Ohio App. 351, 110 N.E.2d 440 (1952), *appeal dismissed,* 158 Ohio St. 258, 108 N.E.2d 679 (1952).

[3] 166 Ohio St. 379, 143 N.E.2d 309 (1957). See also Cleveland Builders Supply Co. v. City of Garfield Heights, 102 Ohio App. 69, 136 N.E.2d 105 (1956).

[4] OHIO REV. CODE §§ 1513.01-.99 regulating strip mining.

[5] 166 Ohio St. 349, 142 N.E.2d 655 (1957).

[6] OHIO REV. CODE § 4561.01-.99.

[7] OHIO REV. CODE § 519.02. Board of township trustees may regulate location, size and use of buildings and lands.

[8] 166 Ohio St. 249, 142 N.E.2d 219 (1957).

[9] The question of damages in condemnation proceedings is thoroughly covered in Sowers v. Schaeffer, 155 Ohio St. 454, 99 N.E.2d 313 (1951).

[10] The issue as to the condemnor's liability for the property as a whole is not to be confused with apportionment of the proceeds between lessor anl lessee. For this purpose the value of the particular leasehold is of paramount importance. See City of Columbus v. Huntington National Bank, 75 Ohio L. Abs. 215, 143 N.E.2d 874 (Ct. App. 1956), *appeal dismissed,* 166 Ohio St. 268 (1957), reviewed under the Landlord-Tenant section of this survey.

[11] 166 Ohio St. 471, 143 N.E.2d 820 (1957).

the purchaser had solicited the services of the broker to locate for him a home in the Cincinnati area. The purchaser discovered the property in question, whereupon the seller gave the broker an open listing. The broker brought no offer and conducted no negotiations; ultimately, the purchaser consummated a direct purchase with the seller. There was no evidence that the broker was prevented from negotiating the sale by the fault of either party. Here the purchase was made at a time subsequent to the initial showing by the broker, under circumstances uninfluenced by the broker. The broker was therefore not the procuring cause and not entitled to a commission.

*Hunter v. Gron*[12] presents an even stronger case in which the broker was denied a commission. The broker had actually consummated the sale under an existing exclusive listing. The sale was contingent upon the seller's purchase of another house, which fell through. All contracts were thereupon rescinded, and the exclusive listing contract of the broker was terminated. At a later date the seller was able to make satisfactory arrangements to purchase, and he thereupon contacted his former prospect directly. The sale was completed without the services of the broker. Again the broker was held not to be the procuring cause.[13]

One last case is worthy of comment because of the frequency with which the problem recurs. Plaintiff purchased a house under construction. Upon completion he discovered that the sewer from the house to the sewer main was improperly constructed and tested. Subsequently the basement was flooded and furniture and carpeting was damaged. Plaintiff was forced to expend money to abate the fault and to restore the premises. The court held that the bargain implied in law between the seller and buyer was the completion of the entire house in such a way that it would be reasonably fit for its intended use, and that the work would be done in a reasonably efficient and workmanlike manner.[14] A money judgment for plaintiff was affirmed. The court noted, however, that it is still the law of Ohio that in the absence of an express warranty the vendor of a completed house is under no obligation with regard to the condition of the house, where no work is in progress and no work is to be done.[15]

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[12] 102 Ohio App. 571, 115 N.E.2d 419 (1953). *Cf.* Kalina v. Fialko, 102 Ohio App. 442, 125 N.E.2d 565 (1955); (broker held not to be a procuring cause).

[13] The broker must prove by a preponderance of evidence that he was the procuring cause to be entitled to a commission. See Rabkin v. Calhoun, 83 Ohio App. 222, 81 N.E.2d 241 (1948).

[14] Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957).

[15] There appears to be a duty of the vendor to speak as to known latent defects but not as to patent defects. See Traverse v. Long, 165 Ohio St. 249, 135 N.E.2d 256 (1956).