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Early v. South Carolina Public Service Authority[1] is by far the most interesting of the several cases decided in recent years involving suits for damages against public bodies for a "taking" of private property for public use without compensation. The respondents owned a tract of land in Georgetown County comprising about 4,500 acres and bordering on and traversed by tidal navigable waters. They brought suit against the appellant, which is an agency of the State of South Carolina whose functions are wholly governmental, claiming that the construction of a dam across the Santee many miles upstream and the resultant diversion of a large part of the flow of the Santee River into the Cooper River caused damage to their fast lands;[2] and that such damage constituted a taking of their property for public use, entitling them to just compensation under the provisions of Section 17, Article I of the State Constitution. The respondents' theory was that the construction of the dam diverted into the Cooper River a large part of the normal flow of the fresh water of the Santee River; that this in turn had caused salt water from the ocean to invade the Santee River and to infiltrate into the streams, creeks, canals, ponds and drainways that ran through their property; that this salt water, which occasionally overflowed plaintiffs' property by reason of storm tides or other causes, killed and destroyed vegetation and damaged plaintiffs' property. The appellant defended on the ground that, as an agency of the State, its action related to state regulation and improvement of navigation, and that since the property of the respondents was subject to a basic navigational servitude, any damage to the property was not compensable. Our Supreme Court did not agree with this contention but held that the damage to the plaintiffs' property did constitute a taking without compensation, and that the damages awarded by the jury should be allowed. The opinion is extremely well written and is persuasively logical. For this reason the writer read and re-read it before concluding to disagree with its holdings. The reason for this conclusion is that the court fails to properly take into account the

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1. 228 S.C. 392, 90 S.E. 2d 472 (1955).
2. Fast lands are those lying above high water.

basic and long recognized navigational rights inherent in the state. This is somewhat hard to understand since the court specifically noted that the liabilities of the state should be determined on principles of law which would be applicable if the United States were involved.

It must be noted by the reader that the basis of the plaintiffs' claim is their right to the maintenance of the natural flow level in front of their lands, and that they had been awarded damages because the state, exercising its sovereign power in regulating the flow of a navigable stream, had reduced the natural level of that flow.

The Supreme Court of the United States had before it the converse of the problem in the case of *United States v. Willow River Power Company.*[3] There damages were sought because of an improvement to a navigable stream which had raised the level of that navigable stream so that it lessened the fall between water flowing into the navigable stream from a non-navigable tributary utilized by a hydro-electric plant. The Supreme Court held that although the natural level of the navigable stream may have been a privilege or convenience which had been enjoyed for many years, and was permissible so long as compatible with navigation interests, it was not an interest protected by law when it became inconsistent with plans authorized by the Congress for improvement of navigation. The riparian owner has no right as against improvements in navigation to the maintenance of a level below high water mark. Further, said the court, whatever riparian rights there may be as between one riparian owner and another, these rights cannot serve to measure riparian rights on a navigable stream when government proceeds to improve navigation. These rights are private rights which give way to the right of the government. The court said:

> Operations of the Government in aid of navigation ofttimes inflict serious damage or inconvenience or interfere with advantages formerly enjoyed by riparian owners, but damage alone gives courts no power to require compensation where there is not an actual taking of property [invasion of fast lands].

The Supreme Court of the United States then draws the apt analogy that the situation is no different from that occurring to the abutting property owner when there is a change of grade in the street in front of his property, and notes that in nearly every state, no recovery for this is allowed. This statement is borne out as the law of South

3. 324 U.S. 499 (1945).

Carolina by a statement of Chief Justice Pope in the case of *Mayrant v. City of Columbia*[4] when he said

> that a municipality has the right to change the grade of its streets either by cutting down or by building up the surface and that no action for damages to property resulting therefrom lies against it, is well settled in this state.

Fortunately, there are not too many cases similar to that under review, but if the state were to embark on any program designed to improve navigation, it would find that under this decision the riparian owner has a compensable property right to maintain the flow of the stream in front of his property which would render very costly any straightening of the channel of navigable waters.

In the ealier case of *Rice Hope Plantation v. South Carolina Public Service Authority*,[5] the court, speaking through the late Judge Lide, laid down principles that the writer feels should have controlled this case. Judge Lide there said:

> Perhaps the most important recent case on this subject is that of *United States v. Commodore Park,* decided in 1945, 324 U.S. 386, 65 S. Ct. 803, 805, 89 L. Ed. 1017, wherein the opinion of the Court was delivered by Mr. Justice Black. In that case the United States dredged a tide water navigable bay and deposited the dredged materials in a navigable arm of the bay called Mason Creek, thereby destroying its navigability, and impairing certain benefits alleged to be inherent in the proximity of the land to a navigable tide water creek. The Court held, however, that a riparian owner is not entitled to compensation for the deprivation of his access to navigable waters. In other words, it was held in this case that the riparian owner was not entitled to recover, because the damages complained of did not result from "taking" by the government of its property for public use, since there had been no invasion of its "fast lands" (lands above high water mark), for its property was more than a mile from the fill made in Mason Creek. The following quotation from the opinion is quite illuminating: "Respondent's property was always subject to a dominant servitude; it did not have a vested right to have this navigable stream remain fixed and unaltered simply because of the consequent reflected additional market value to adjacent lands. Whatever market value of riparian lands may be attributable to their closeness

4. 77 S.C. 281, 57 S.E. 857 (1906).
5. 216 S.C. 500, 59 S.E. 2d 132 (1950).

> to navigable waters, does not detract from the government's 'absolute' power in the interests of commerce, to make necessary changes in a stream. In short, as against the demands of commerce, an owner of land adjacent to navigable waters, *whose fast lands are left uninvaded,* has no private riparian rights of access to the waters to do such things as 'fishing and boating and the like', for which rights the government must pay." Emphasis added.

It seems clear that a relocation of a public highway which does not deprive the abutting owner of ingress and egress is *damnum absque injuria.*[6] Wherein are different our navigable streams which are declared by Section 1 of Article XIV of our Constitution to be "common highways and forever free"?

In the case of *Godwin v. Carrigan*[7] Godwin sought a writ of mandamus requiring the corporate authorities of the Town of Summerton to condemn lands owned by him which he alleged to have been taken from him by the town. The taking alleged consisted of the discharge of sewage from the sewage disposal unit employed by the town upon Godwin's land. The condition complained of had existed for many years, and the return filed by the town officials denied the plaintiff's right to compensation and alleged that the controversy which had been of long standing had been legally compromised. The court noted that the writ of mandamus is employed only to compel the performance of ministerial duties, and held in this case that there was no statutory provision requiring the town to undertake condemnation proceedings in this case. The court noted that Act 225 of 1953 prescribing the procedure in condemnation actions by municipalities contains a provision that its procedure shall be exclusive, but it held that the Act did not cover the situation before the court in this case. It indicated that mandamus would lie to compel the institution of condemnation proceedings in cases where the right to compensation is conceded. However, where the right is denied, a suit at common law, (*sic*) triable before a jury is the proper remedy.

Actually, this is the sort of case where a suit for damages lies, even in the absence of a statute empowering the institution of such action because of the provision of Section 17, Article I, of the Constitution, which prohibits the taking of private property for public use without compensation being made therefor. (See *Fairey v. City*

6. Wilson v. Greenville County, 110 S.C. 371, 96 S.E. 301 (1918); State v. Hughes, 147 S.C. 452, 145 S.E. 297 (1928).
7. 227 S.C. 216, 87 S.E. 2d 471 (1955).

of Orangeburg,[8] discussed, *infra.*) Therefore, the suit is predicated upon a constitutional right.

Fairey v. The City of Orangeburg, referred to *supra,* involves a rather ingenious attempt, which, nonetheless, very properly failed, to get around the long standing rule in South Carolina that except where the act complained of in effect constitutes a taking of private property for public use without just compensation, municipal corporations are not liable in tort unless made so by statute.

While not here noted by the court, it should be remembered that in South Carolina there is no distinction, such as is drawn elsewhere, between governmental actions of municipal corporations and actions of such corporations which are denoted as private or proprietary in nature. All functions of a municipal corporation are regarded as governmental.[9]

For several months during 1953, the City of Orangeburg maintained a herd of hogs on its garbage dump. The herd was permitted to eat uncooked garbage notwithstanding that the city had no permit allowing this.[10]

The city sold some of its hogs which were infected with vesicular exanthema at a large auction market. Apparently, while there, these hogs spread the disease to other hogs at the auction which were purchased by the plaintiff who was a non-resident of the City of Orangeburg and owned no property therein. The plaintiff mingled these hogs with the hogs of his own herd, which then became infected. As a consequence, he was required to slaughter and bury his herd, his farm was quarantined, and for the damages thus incurred, he sued the city in tort.

The only statute which the plaintiff could find which might afford a basis for his action was CODE OF LAWS OF SOUTH CAROLINA, 1952 § 47-379 relative to cities over 5,000 in population and which provides that:

> Any such city shall be liable for all damages done to the property of any citizen thereof, or property holder therein, by any of its officers, agents or servants under and by virtue of any authority or orders of the city council.

8. 227 S.C. 458, 88 S.E. 2d 617 (1955).

9. Sammons v. City of Beaufort, 225 S.C. 490, 83 S.E. 2d 153 (1954); Irvine v. Town of Greenwood, 89 S.C. 511, 72 S.E. 228 (1911); Looper v. City of Easley, 172 S.C. 11, 172 S.E. 705 (1934); Carter v. City of Greenville, 175 S.C. 130, 178 S.E. 508 (1934).

10. For several years farmers of the state have suffered damage to their hogs through the spread of a disease known as vesicular exanthema, a disease attributable to the use of uncooked garbage in feeding hogs. As a consequence, regulations have been put into effect prohibiting the use of uncooked garbage except under written permits. The regulations are regarded as highly effective.

Recognizing that the section did not exactly fit the facts of the case, the plaintiff ingeniously argued that the portions of the statute limiting the cause of action therein granted to the citizens of the city or property holders therein was an improper classification and should be stricken from the statute, which should then be allowed to stand providing a cause of action for damages done to the property of any person.

The court held that the provisions of the statute were inseparable and would have to stand or fall as written. It then noted that if the statute fell in its entirety, it served the plaintiff no purpose, for then there would be no statute permitting anyone any recovery. However, in keeping with the rule that courts do not pass on the constitutionality of statutes unless absolutely required to do so, the court refused to rule further on the constitutionality of the statute since the question, insofar as the plaintiff was concerned, had become academic. Thus was the ingenious theory of the plaintiff defeated.

The case points up the fact that the narrow classification of persons who were afforded relief by the statute is questionable. Presumably, the question will be raised by the next municipality sued in tort by one of its citizens.

As noted by the court in its opinion, there are South Carolina decisions to the effect that the exclusion of persons within a class from the right to sue is an unconstitutional denial of due porcess. It is hard to see why damage done to property of one not a citizen of a town is any different from damage done to property of one who is a citizen of the town.

The contest in the case of *City of Orangeburg v. Buford*[11] relates to admissibility of evidence relating to the value of property condemned by the City of Orangeburg for a public alleyway, and in deciding that the lower court erred in refusing testimony relative to a possible use of the property which was condemned, the Supreme Court restated the well established rule that the landowner is entitled to compensation upon the basis of the most advantageous and profitable use of the land being condemned — that in estimating the value of the property condemned, all uses to which it may be adapted should be considered and not merely that to which it was then applied by the owner. Likewise, it was stated that the fact that the most profitable use of a parcel is that which results from its use in combination with other lands, does not exclude that use from consideration.

The owner of the tract of land being condemned sought to establish that it would be utilized by her tenant of an adjoining lot in

11. 227 S.C. 280, 87 S.E. 2d 822 (1955).

extending a building then lying wholly on the adjoining lot. The testimony had been excluded on the ground that the lease between the condemnee and her tenant did not establish that it was within the contemplation of the parties that the condemned area would be so used. But the court admitted parole testimony to the effect that is was intended by the condemnee and her tenant to so utilize the area that was condemned, noting that the rule that parole evidence could not vary a written contract was generally limited to the parties to the instrument and their privies. The holding in this case seems well supported by authorities.

Hall v. City of Greenville[12] is one of the rash of lawsuits against the City of Greenville that has arisen in recent years based upon damages done to real property in Greenville from changes in the storm drainage system of that city.[13] The suits were brought under Section 59-224 of the CODE OF LAWS OF SOUTH CAROLINA, 1952 which specifically renders municipal corporations liable for damages when property is damaged by surface water cast upon it as a result of constructing or changing the drainage of surface water. Negligence is not an essential ingredient of the cause of action in favor of the landowner. And, this cause of action becomes complete if, after demand, the municipality fails to provide adequate drainage to prevent passage of the water from the street over the property.

The case came before the Supreme Court after the lower court had granted a nonsuit upon several grounds which included the contention that the plaintiff had failed to prove negligence on the part of the city. The nonsuit was also granted on the ground that the testimony showed the water damaging the plaintiff's property resulted from the overflow of a live stream, also upon the ground that the damage to the plaintiff's property resulted from its condemnation by the Board of Health as a place unfit for human habitation, and finally upon the ground that there was no evidence that the plaintiff had made the demand for proper drainage required by Section 59-224. The court reviewed the testimony and concluded that a conflict existed with respect to grounds 2, 3 and 4 which must be resolved by a jury. In so doing it noted that if the city chose to use a live stream for the disposal of surface water, it could not overtax the normal capacity of the stream without becoming liable therefor. The decision, as it relates to the law of public corporations, is in line with the holdings of the court in its earlier cases, some of which are noted above.

12. 227 S.C. 375, 88 S.E. 2d 246 (1955).
13. See also Holliday v. City of Greenville, 224 S.C. 207, 78 S.E. 2d 279 (1953), and Belue v. City of Greenville, 226 S.C. 192, 84 S.E. 2d 631 (1954).

The case of *Town of Forest Lake v. Town of Forest Acres*[14] relates to the validity of a municipal license ordinance of the Town of Forest Acres. The holding of the court sustained that part of the ordinance which imposed graduated license fees and struck down flat fees. It did so because of the provisions of Section 6, of Article VIII, of the Constitution, which requires that licenses or privilege taxes imposed shall be graduated so as to secure a just distribution of the tax upon the classes subject thereto. The statute law of South Carolina granting to cities and towns power to require by ordinance the payment of a reasonable sum of money as a license fee for the privilege of doing business likewise requires such license to be graduated according to the gross income of the person required to pay it, or upon the gross amount of capital invested in the business. A portion of the challenged ordinance clearly did not comply with these provisions and hence was properly stricken down by the court.

Bohlen v. Allen[15] involved a contest for the position of county engineer of York County. Bohlen was duly appointed county engineer pursuant to a provision empowering the appointment of a County Engineer by the "governing body of the County" (its County Board of Directors) and the county supervisor. Following certain differences between Bohlen and the Board of Directors, the Board attempted to discharge Bohlen. Bohlen's term of office, which was to expire on August 15, 1954, was extended under a provision in the York County Supply Bill for 1954 providing that the present county engineer should serve under the terms and conditions of his present contract until his successor was elected and qualified in full compliance with the York County Board of Directors Act. At a meeting held on September 8, 1954, the Board of Directors, by a vote of four to one, selected J. Ben White as county engineer. The supervisor failed to concur in this selection and abstained from the voting. The validity of White's appointment hinged on the meaning of the statute which stated that in the selection of the county engineer, the Board of Directors and the county supervisor should act in conjunction, and on that basis the court decided that the selection of White was without authority of law and void. While the decision seems correct, and literally interprets the law as the Legislature intended it to be interpreted, the situation here points up the awkward system of county government prevalent throughout most of South Carolina where control of county functions is sometimes straight-jacketed through

14. 227 S.C. 163, 87 S.E. 2d 587 (1955).
15. 228 S.C. 135, 89 S.E. 2d 99 (1955).

local laws enacted by the General Assembly. There are, of course, two basic reasons as to why this condition prevails. First of all, at the time when our Constitution was written, the functions of government to be performed by counties were relatively few, for, apart from a few incorporated cities and towns, the state was almost completely rural. Then too at the time of the adoption of the Constitution of 1895, it was feared that the heavy negro vote in certain parts of the state would place rural government in the hands of the negro. For that reason, the Constitution envisaged action on the part of the entire Legislature to protect the white minority in those areas where whites were in the minority. If memory serves the writer correctly, there was at least one negro representative from the lowcountry sitting in the House of Representatives at the turn of the century.

A marked departure from legislative control is Charleston County, where a system of local government comparable to that existing generally throughout the country has been adopted and has been successfully operating for several years.

James v. City of Greenville[16] is an interesting case in the field of zoning. Greenville's Zoning Ordinance was adopted in 1944. At that time the real estate involved in the decision was not within the corporate limits of Greenville. James purchased his property in 1945 and commenced the operation of a trailer court thereon in 1947. In 1948 the so-called Augusta Road section, in which lies the property of James, was annexed to Greenville. In 1950 the city re-zoned the area and placed James' property in a class A district. This is the most restrictive district and permits only single family dwelling residences. In due course the petitioner was notified by the city's building commissioner that the use of his property constituted a nonconforming use and would have to be discontinued. Petitioner appealed to the Board of Adjustment which sustained the ruling of the building commissioner. He then appealed to the Court of Common Pleas. The case was referred to a master whose report was adverse to the property holder. The Court of Common Pleas then confirmed the master's report. On appeal to the Supreme Court, the action below was reversed. The principal basis for the court's action is founded upon the proposition that while cities may adopt zoning ordinances and restrict the use of property through the exercise of the police power, this power does not permit a city to remove from a residence district a lawful business already established there, in the absence of a factual showing that the continuance of such busi-

16. 227 S.C. 565, 88 S.E. 2d 661 (1955).

ness would be detrimental to the public health, safety, morals or general welfare. Both the majority and the concurring opinion pointed out that if the general statement in the zoning ordinance, that it was adopted for the promotion of the public safety, health, convenience, comfort, morals, prosperity and general welfare, was taken as a legislative declaration that the appellant's business was, in point of fact, detrimental to the public safety, health, morals and general welfare, there was nothing in the evidence which supported such declaration and, on the contrary, the evidence thoroughly refuted such a conclusion.

The writer of the principal opinion was also impressed with the apparently arbitrary action of the city in placing the appellant's property in an A residential district when property very close to it was placed in an E or commercial district. However, the basis for the decision is the proposition of law noted above. In fact, the concurring opinion was signed by two other judges and hence became the majority opinion. It is based solely on the proposition noted above and does not comment on the apparent arbitrary action of the city in establishing the zoning affecting the appellant's property.

Corbin v. Cherokee Realty Company[17] states several important principles relating to rights of municipalities in streets in subdivided areas. These principles are of considerable importance today since there exists generally throughout the state a tendency on the part of municipalities to extend in their boundaries. More often than not, the areas annexed are properties only recently subdivided. The court correctly states that the offer of dedications made by one subdividing property by laying out a series of streets in a subdivided area of land does not have to be accepted in its entirety. Any street can be accepted in part and rejected in part. The public cannot be compelled to assume the burden which would be imposed if it had to accept every part of the tendered dedication.

A second important principle is that which notes that a municipality does not have to run its streets the way it is proposed they be run by the subdivider. It can lay out streets on an entirely different plan. Furthermore, its power of condemnation is not affected by the offer of dedication. In this connection it should always be borne in mind that the power of eminent domain is one of the basic attributes of sovereignty and can neither be surrendered nor bartered away. (*Contributors to Pennsylvania Hospital v. City of Philadelphia.*[18]) In that interesting case the city and the hospital

17. 229 S.C. 16, 91 S.E. 2d 542 (1956).
18. 245 U.S. 20 (1917).

had in 1854, memorialized the Legislature of Pennsylvania and had secured the enactment of a law forbidding the opening of any street or alley through the hospital grounds without the consent of the hospital authorities. The act was conditioned upon the hospital furnishing certain of its lands for streets. The hospital had complied with the conditions. In 1913 the city, with legislative authorization which had been subsequently enacted, undertook through the means of eminent domain to open a street through the hospital grounds without the consent of the hospital authorities. The condemnation proceedings undertook to condemn not only the land but the hospital's rights under the contracts of 1854. The right to do both was upheld by the Pennsylvania Court. The action of the Pennsylvania Court was affirmed, the Supreme Court of the United States stating that it would be unthinkable that the inherent right to exercise eminent domain could be taken away by contract.

The holding in the case under review properly applies the principles of law noted above to the facts as disclosed in the opinion.