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PUBLIC CORPORATIONS

THEODORE B. GUERARD AND HUGER SINKLER*

Doctrine of Purprestures Misapplied

By far the most interesting case in the field of public corporations in many years was decided by the Supreme Court of South Carolina in the period covered by this review. It is the case of *Sloan v. City of Greenville*[1]. The well written opinion makes it extremely difficult to take issue with the result. Nevertheless, long consideration of the decision has resulted in the writers' opinion that the result is wrong. Such a categoric statement demands specific reasons. Accordingly, it is desirable to set forth the facts quite fully.

It appears that W. H. B. Simpson and John A. Ellison successfully sought permission from the City Council of Greenville to construct a five story, ten level parking building at the intersection of West McBee Avenue and South Laurens Street in such fashion that a portion of the building would overhang West McBee Avenue and South Laurens Street. The overhang on South Laurens Street would commence about 12 feet above street level and extend out over the street for 8 feet. The application had been duly considered by the Public Safety Committee of the City Council of Greenville. This Committee had held a public hearing and subsequently unanimously approved the issue of the permit. The matter was taken up before City Council in public meeting and Council likewise gave consent to the project and by its action directed that the permit be given to Simpson and Ellison which would permit the construction of the parking building with the overhang described above. The action here was brought by the Plaintiff, Sloan, as a taxpayer, citizen, resident and user of the streets in the City of Greenville. Thus, it will be seen that he had no special right affected which formed the basis of his action and that he proceeded only as a member of the general public. This fact has considerable significance. It also does not appear that the use of the streets by the plaintiff and the public could possibly be affected except perhaps for esthetic reasons.

*Sinkler, Gibbs and Simons.

1. 235 S. C. 277, 111 S. E. 2d 573 (1959).

The question for decision in the case was whether the City Council of Greenville had authority to permit the area above the streets to be so encroached by private persons. In the course of deciding the matter, the Court concluded that since the lands had been dedicated to the public for street use only, the City of Greenville had no power by contract, ordinance or permit to allow the street to be used for a purpose other than public. In so doing, the Court brushed aside a statute which seems to specifically and clearly give to the City Council the power to permit an encroachment of this sort.

The CODE OF LAWS OF SOUTH CAROLINA Section 47-61 (1952) reads as follows:

> The city and town councils of the cities and towns of the State shall, in addition to the powers conferred by their respective charters, have power and authority to make, ordain and establish all such rules, bylaws, regulations and ordinances, not inconsistent with the laws of this State, respecting the roads, streets, markets, police, health and order of such cities and towns or respecting any subject as shall appear to them necessary and proper for the security, welfare and convenience of such cities and towns or for preserving health, peace, order and good government within them . . . .

This statute was enacted in 1896 and is the first general law delegating to municipal councils powers to regulate streets, etc. However, there is a definite reason why no general law was passed at an earlier date. Until the adoption of the Constitution of 1895, all municipal corporations were chartered by special act. The powers of each municipal corporation therefore stemmed from special enactments. It was only by reason of the mandate of Section 1 of Article VIII of the Constitution that the general statute became necessary. Article VIII, Section 1 provides:

> The General Assembly shall provide by general laws for the organization and classification of municipal corporations. The powers of each class shall be defined so that no such corporation shall have any powers or be subject to any restrictions other than all corporations of the same class. Cities and towns now existing under special charters may reorganize under the general laws of the State, and when so reorganized their special charters shall cease and determine.

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However, it is significant that the language in the general statute is of ancient origin. The City of Charleston was chartered by an Act of 1783. Its Charter contains a provision giving its City Council the power to:

> . . . make and establish such bye-laws, rules and ordinances, respecting the harbour, streets, lanes . . . that shall appear to them requisite and necessary for the security, welfare and conveniency of said city . . .

Charters of other old towns are quite similar. The Charter of the City of Georgetown, granted in 1803, contains this provision:

> . . . that the said town council shall also have full power to make and establish, and when they see fit, to alter all such rules, by-laws and ordinances, respecting the harbor, streets, lanes and alleys, public buildings, markets, . . . and in general, every other by-law and regulation, that shall appear to them requisite and necessary, for the health, security, welfare, good government and convenience of the said town.

while the Charter of the City of Beaufort, granted in 1803, contain almost identical language:

> . . . they shall also be vested with full power and authority, from time to time, under their common seal, to make and establish such by-laws, rules and regulations, respecting the harbor, streets, lanes, public buildings, workhouses, markets, . . . and in general, every other by-law or regulation that shall appear to them requisite and necessary, for the security, welfare and convenience of the said town, or for preserving peace, order and good government with the same.

Now, there can be no doubt but that one who encroaches upon a street or public highway without permission creates the purpresture described by the Court, but the whole point of the case is that the municipal councils in cities and towns of South Carolina have for more than 200 years assumed that they had the power to permit encroachments of the sort considered by the Court in this case.

One has only to look about the City of Charleston to see literally hundreds of purprestures. Two streets are spanned by overhead thoroughfares which connect buildings upon the opposite sides of the street. The Medical College Hospital is

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thus connected with the Medical College classrooms and clinical departments. An important department store has buildings on the opposite sides of each street similarly connected. The portico of St. Michael's Church, erected over 200 years ago, extends completely over the sidewalk. Similar encroachments exist throughout Charleston. Indeed, one of the more beautiful is a wrought iron balcony which ornaments the charming home of a member of the Court who concurred in the opinion here. Purprestures are not confined to the larger cities. Almost every country town in South Carolina had its general stores with a wooden shed of awning effect extending over the sidewalk.

Thus, for almost 200 years those in charge of municipal government thought that the plain language of a statutory authorization "to make, ordain and establish all such rules, bylaws, regulations and ordinances, not inconsistent with the laws of this State, respecting the roads, streets, markets, police, health and order of such cities and towns or respecting any subject as shall appear to them necessary and proper for the security, welfare and convenience of such cities and towns or for preserving health, peace, order and good government within them," gave them the power to permit encroachments of this sort. Even if their assumptions were wrong, their actions have been so widespread and so generally accepted that the situation here demanded an application of the maxim: *communis error facit jus*. Actually, however, there is a South Carolina decision—afterwards discussed but overlooked in the opinion—whose reasoning fully supports the action of the City Council of Greenville.

It should be noted that the situation in this case did not involve an encroachment unauthorized by the municipal authorities. It is not a case involving the complaint of a private property owner who alleges special damages as a result of an encroachment, authorized or unauthorized, or the closing of a public street without the authorization of the Legislature. Any one of these situations would have involved basic legal rights and relationships essentially different from those involved in the case under review. Relief in such situations might be granted in a proper case without impeaching the basic principle whose application the writers feel should have resulted in the denial of the relief sought in this case, to-wit: that the encroachment permitted by municipal authorities was

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pursuant to the authorization of a state law, and therefore, was not a purpresture.

It is hoped that no attempt will be made by members of the public to remove the many "purprestures" which add so much to the charm of our older cities. Charleston would hardly be Charleston if the lovely wrought iron balcony mentioned earlier has to be removed.

During the course of its opinion, the Court overruled the respondent's contention that the plaintiff had no capacity to sue, stating that an objection of this sort had to be taken by demurrer and was deemed to have been waived. Perhaps this holding is correct but the whole point of the case is that the plaintiff states no cause of action, and thus had no basis for relief, and waiver by the respondent could not convert what was not a cause of action into a basis for relief.

The case of *Cherry v. Fewell*,[2] (Mayor of Rock Hill) supports the position of the City Council of Greenville. The litigation there resulted from action taken by the City Council of Rock Hill in altering the route of Park Avenue in that City, so that instead of passing through the grounds of what is now Winthrop College, it would pass around those grounds. The plaintiff owned a lot on Park Avenue at a distance beyond the point of the street which had been re-routed, but brought his action for injunctive and other relief upon the ground that the action of the City Council of Rock Hill was without lawful authority. The City defended upon the ground that the special act incorporating the City of Rock Hill gave to the City Council "full power and authority to open new streets in said city, and close up, widen, or otherwise alter those now in use, or which may hereafter be established, whensoever, in their judgment, the same may be necessary for the improvement or convenience of said city . . . ."

The Court was careful to note that the plaintiff, Cherry, had suffered no special damage, and therefore, his status was one as a member of the public. The Court stated:

> It is clear, therefore, that the injury of which plaintiff complains is not that special or peculiar injury, differing in kind, and not merely in degree, from that which the public generally sustain, which alone would entitle a private person to maintain an action either for damages or for an injuction in a case like this; for there is no alle-

2. 48 S. C. 553, 26 S. E. 798 (1897).

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gation that the plaintiff either has sustained or is likely to sustain any injury of a special or peculiar character, differing in kind from that to which every other person entitled to use such street would be exposed in passing to and fro over and along said street.

The Court held that the statutory authorization granted to the City Council afforded ample authority for the action taken, and therefore, concluded that since the plaintiff could allege no special damage, he stated no cause of action.

Purprestures are not confined to encroachments. The word " 'purpresture' cometh of the French word 'pourprise,' which signifieth a close, or enclosure; that is, where one encroacheth or maketh several to himself that which ought to be common to many." Co. Litt. 277b; Co. Magna Charta, 38, 272. (Most early cases dealing with purprestures involved actual barricades across public ways.)

The similarity of the two situations is apparent. Cherry had no special rights which were affected by the City of Rock Hill's action in closing off a portion of what had been Park Avenue, so as to incorporate it within the campus of Winthrop College. Nevertheless, if there had been no statutory authorization for that action it would have been unlawful and would therefore have been a purpresture of which Cherry might have complained. In the case here Sloan clearly had no special damage, and notwithstanding the fact that the action taken by the City Council of Greenville was pursuant to a statute which gave to City Council the power to regulate the use of public streets, he was permitted, as a member of the public, who had suffered no special damage, to interfere with a very proper use of power granted to the City Council of Greenville by the general statute of the State.

The Court Refuses to Enlarge Statutory Liability of Municipal Corporations

In two decisions handed down during the period under review, the Court refused to enlarge the statutory liability of municipal corporations.

The case of*McKenzie v. City of Florence,*[3] was brought up on appeal by the plaintiff from the order of the lower Court sustaining the demurrers of the defendants, the city and the surety company.

3. 234 S. C. 428, 108 S. E. 2d 825 (1959).

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The appellant in his complaint had alleged two causes of action for alleged negligent, reckless, willful and wanton conduct of the police officers of the defendant city in arresting and imprisoning him. The complaint further alleged that the action of the police officers represented failure on their part to perform their duties as members of the Police Department of the City of Florence and that he received serious and permanent injuries as a result thereof. The complaint further alleged that a bond entered into between the defendant city and the defendant surety company was issued for the benefit of the public, including appellant.

In sustaining the city's demurrer, the Court reaffirmed the principle that a municipal corporation cannot be sued in tort in the absence of a statute granting such a right of action, tracing the origin of this principle in South Carolina to the 1820 decision of *Young v. Commissioners of Roads*.[4]

The appellant contended that the defendant city had waived its statutory immunity by taking out a fidelity bond (apparently pursuant to a City Ordinance) upon the policemen allegedly committing the delicts complained of. On page 829 of the decision, the Court clearly holds that a municipal corporation cannot waive its immunity to tort liability in the following language:

> The City of Florence has only those powers prescribed by the Constitution or the statute law of this State and those necessarily are fairly implied or incident to the powers expressly conferred. There is no statute in this State that empowers a municipal corporation to waive immunity to tort liability. Certainly it cannot be said that the power of waiver is implied or incident to the Constitution or statutory powers expressly conferred.

After this clear statement that the defendent city *could not* waive its immunity to tort liability, it is difficult to understand why the opinion continued on with its discussion to reach the conclusion on the following page: "That the City of Florence did not waive its immunity by the purchase of the bond in question."

After disposing of the question of the defendant city's immunity from tort liability, the opinion discussed at length the question of whether the bond created a right of action by the appellant against the surety company. Concluding that the

4. 2 Nott & McC. 537 (1820).

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bond was an indemnity only to the defendant city, the Court refused to extend the surety's obligation beyond the express terms of the bond, and sustained the surety company's demurrer.

Since the Court obviously intended to reaffirm the principle that a municipal corporation cannot waive its immunity to tort liability without statutory authorization to do so, it has unnecessarily weakened its holding on that point by its additional discussion and finding that the City of Florence did not in point of fact waive its immunity.

In this case the Court was again asked to overrule the doctrine of municipal immunity in tort established by many earlier decisions. Very properly the Court refused to do this and reaffirmed its position set forth in the case of *Rogers v. Florence Printing Co.*,[5] that where a public policy exists, it is for the Legislature and not the Court to revise or discard it.

In the case of *Furr v. City of Rock Hill*[6] the plaintiff had obtained a verdict in the lower court and the appeal was from the lower court's refusal to grand a judgment n.o.v. In reversing the lower court, the Supreme Court refused to enlarge the liability of a municipality under the CODE OF LAWS OF SOUTH CAROLINA Section 47-70 (1952),[7] to include injuries suffered by a pedestrian from a fall occurring within a stadium area owned by the defendant city. The holding was grounded on the finding that a plaintiff's injuries did not occur on a street or public way maintained by the city.

This decision reaffirmed the Court's previous holdings in the decisions cited therein that the liability of a municipality under the statute in question is predicated upon it duties to maintain its streets and other public ways in reasonable repair for the purpose of travel thereon and that the words "immediately under the control of the corporation" do not enlarge the field of liability beyond that purpose but relate to instrumentalities used in the maintenance and repair of streets for the purpose of travel.

5. 233 S. C. 567, 106 S. E. 2d 258 (1958).
6. 235 S. C. 44, 109 S. E. 2d 697 (1959).
7. "Any person who shall receive bodily injury or damages in his person or property through a defect in any street, causeway, bridge or public way or by reason of a defect or mismanagement of anything under control of the corporation within the limits of any city or town may recover in an action against such city or town the amount of actual damages sustained by him by reason thereof if such person has not in any way brought about any such injury or damage by his own negligent act or negligently contributed thereto . . . . "

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In refusing to enlarge the scope of the statute as judiciously construed in previous decisions, the Court again very properly refused to trespass upon an area in which action, if to be taken at all, should be done by the Legislature.