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Public Corporations

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PUBLIC CORPORATIONS

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PREFACE

The cases reviewed under the heading of Public Corporations include many interesting decisions dealing with diverse subjects. Among the questions before the Supreme Court was a proposed scheme wherein two Counties and a City would underwrite the construction of an airport, a contest arising out of the rivalry between a privately owned electric company and an electric cooperative, and a jurisdictional dispute involving three governmental units. Also there are a number of decisions arising out of condemnation cases.

Richland-Lexington Airport District Financing Scheme Held Unconstitutional

In an earlier decision,[1] the South Carolina Supreme Court upheld the financing of the Greenville-Spartanburg Airport through the issuance of general obligation bonds of the Greenville-Spartanburg Airport District, payable from an ad valorem district-wide tax. The financial arrangements there involved the two counties of Greenville and Spartanburg.

In the decision under review here, *Watson, et al v. Pulliam*,[2] the Court had occasion to consider a financial scheme involving three governmental units, to-wit, Richland County, Lexington County, and the City of Columbia, for the purpose of financing the construction of the Richland-Lexington Airport. The 1961 legislative enactment under attack created the Richland-Lexington Airport District, which extends over the entire area embraced by the counties of Richland and Lexington, for the purpose of establishing and maintaining an airport. To defray the cost of constructing the airport, the Commission was authorized to issue general obligation bonds of the District and to levy an ad valorem district-wide tax, sufficient to retire the indebtedness. In these particulars the enactment here did not differ materially from the legis-

*Sinkler, Gibbs and Simons, Charleston, S. C.

1. Berry v. Milliken, 234 S. C. 518, 109 S. E. 2d 354 (1959).
2. 239 S. C. 186, 121 S. E. 2d 910 (1961).

lation upheld in the earlier Greenville-Spartanburg Airport District litigation.

The plan here under attack, however, departed from the earlier approved district-wide financing plan in that three governmental units, Richland County, Lexington County, and the City of Columbia, were involved and each was to provide ⅓ of the debt service for the bonds from the annual "kick-backs" to counties and municipalities from the taxes levied by the State on alcoholic beverages, beer and wine, and on personal and corporate incomes. These obligations were to be evidenced by notes of each unit to the Airport District.

Legislation in *pari materia* also adopted by the 1961 General Assembly similarly provided that the three governmental units would make provision to cover any operating deficit of the Airport District by the levying of taxes. This "Operating Deficit Act" authorized the Comptroller General to withhold "kick-backs" from any of the three governmental units which should fail to provide its ⅓ share of the operating deficit.

The lower court sustained both the District Act and the Operating Deficit Act, each of which was challenged on numerous grounds: The lower court concluded that the provisions of the Operating Deficit Act requiring the three units each to levy sufficient taxes was unconstitutional, but sustained the remaining portions of the Operating Deficit Act, stating that the unconstitutional part was separable from the rest. Essentially, the lower court considered the proposed arrangement as a joint venture voluntarily entered into by three political subdivisions of the type and in the manner approved in several earlier decisions.[3]

The Supreme Court, however, reversed the lower court and held both acts unconstitutional. The Supreme Court refused to regard the proposed scheme as a joint venture of the type sustained in earlier decisions. On the contrary, the Court considered that the City of Columbia "is given no voice whatsoever in determining whether that governmental entity shall enter into this venture." It based this conclusion on its reading of the District Act as obliging the city to underwrite ⅓ of the debt service of the district's general obligation bonds,

3. Allen v. Adams, 66 S. C. 344, 44 S. E. 939 (1903), a Town and a School District; Fripp v. Coburn, 101 S. C. 312, 85 S. E. 774 (1915) two Towns; Bagnall v. Clarendon and Orangeburg Bridge District, 131 S. C. 109, 126 S. E. 644 (1925), two counties; and Cothran v. Mallory, 211 S. C. 387, 45 S. E. 2d 599 (1947), a County and a City.

and on its reading of the Operating Deficit Act as providing for the withholding of the city's share of kick-back by the Comptroller General if the city should fail to provide its part of the operating deficit. In both instances the Court concluded that the City of Columbia had no discretion as to whether it would or would not cooperate in the venture.

Viewing the proposed arrangement as it did, the Court correctly declared the acts under attack unconstitutional as violative of the rights of the City of Columbia under Article VIII, Section 1 of the South Carolina Constitution, which prohibits the General Assembly from depriving one municipality of powers accorded other municipalities of the same class, or from imposing restrictions upon one municipality which are not imposed upon other municipal corporations of the same class, a constitutional safeguard which was recently sustained in the case of *Sossamon v. Greater Gaffney Metropolitan Utilities District.*[4] A portion of the City of Columbia's share of state "kick-backs" was diverted from general municipal uses to help defray the cost of constructing the district's airport, and no other city was subjected to a similar restriction.

It is interesting to note that in conclusion, the opinion states:

> We may add, however, that under the plan of financing embodied in this Act, which is a sort not heretofore passed upon by this Court, there is presented a serious question by appellants' claim that the Legislature has sought here to do by indirection that which it is prohibited from doing by Section 1, Article 10 of the Constitution, requiring that taxation be equal and uniform throughout the area taxed.

Power of Appointment Does Not Include Power of Removal

The case of *Stewart v. Union County*[5] concerned an action brought by the plaintiff to recover wages due him. The plaintiff was appointed pursuant to statute by the Union County Supervisor as superintendent of the county home and captain of the Union County chain gang for a term beginning July 1, 1958, and ending July 30, 1959. In the middle of his term, and on January 5, 1959, a new supervisor took office, and

4. 236 S. C. 173, 113 S. E. 2d 534 (1960).
5. 239 S. C. 610, 124 S. E. 2d 329 (1962).

at 7:00 A.M. that morning before he himself had qualified as supervisor, he discharged the plaintiff. The plaintiff was unsuccessful in his appeals to the Board of Township Commissioners for reinstatement and for his salary for the remainder of his term. The lower court sustained the county's demurrer. The Supreme Court reversed the court below on the grounds that while the Supervisor of Union County is expressly given by statute the power to appoint the superintendent of the county home and a captain of the Union County chain gang, it did not follow that he had the power of removal except for cause, in the absence of any provision in the statute providing for summary removal. The Court held the plaintiff's removal unwarranted and that the plaintiff was entitled to a judgment for the balance of his salary.

It is interesting to note that here was involved no question of who was to perform the functions of the superintendent of the county home and the captain of the chain gang for the balance of the year. These were apparently done by the new appointee. This was merely an action for salary.

The record is silent regarding other employment which the appellant could have obtained or any remuneration which he received from other employment during the balance of his term. It would seem that these factors might have been material, inasmuch as an employer can show in mitigation of damages that the discharged employee obtained, or could have obtained other employment. The burden in this connection would appear to be upon the employer.[6]

Jurisdiction of South Carolina Water Pollution Control Authority Over Pollution of Streams or Other Waters of the State Upheld

The Board of Public Works of the City of Gaffney, a municipal agency charged with the management and control of the waterworks and sewerage systems of Gaffney, had determined to enlarge the sewage disposal plant of the City of Gaffney, located on Beaverdam Creek in Cherokee County. In April, 1959, Beaverdam Creek was given a lower classification by the South Carolina Water Pollution Authority in order to permit the Board of Public Works to complete the proposed enlargement. Later that year, the supervisors of the Cherokee County Soil Conservation District, within whose

6. Latimer v. York Cotton Mills, 65 S. C. 135, 44 S. E. 559 (1903).

boundaries the sewage disposal plant and Beaverdam Creek were located, sought to have Thickety Creek reclassified upwards from class C to class A. Beaverdam Creek is a tributary of Thickety Creek and flows into Thickety Creek west of the City of Gaffney. This application was brought about as a part of a plan of the supervisors to create an extensive watershed on Thickety Creek.

In June, 1960, the Authority concluded that Thickety Creek should retain its class C classification, and denied the application for an upward classification, and shortly thereafter, in August, 1960, the Authority granted the Board of Public Works a permit to construct the proposed enlargement of the disposal plant on Beaverdam Creek.

Thereupon, the supervisors brought this action, *Camp, et al v. Board of Public Works,*[7] against the Board of Public Works and the South Carolina Water Pollution Authority, in an effort to have the Court invalidate the permit issued to the Board to construct an enlargement to the disposal plant on Beaverdam Creek, to restrain the Board from constructing the proposed sewage disposal treatment plant on Beaverdam Creek, and finally, to restrain the Board from proceeding with the enlargement until the validity of the permit had been established by the Court.

Thus, the case involves a dispute among three state administrative agencies, all of which are statutory bodies whose powers are set forth in and prescribed by the Statutes of South Carolina — the Board of Public Works, charged with the operation of the waterworks and sewer system of the City of Gaffney; the South Carolina Water Pollution Authority, vested with the jurisdiction to abate, control and prevent the pollution of the waters of the State; and the Cherokee County Soil Conservation District, created to conserve the soil resources of the district and control or prevent soil erosion.

Although there were numerous questions raised regarding the merits of the controversy, the Supreme Court, in reversing the order of the lower court voiding the permit, decided the matter solely on the grounds that the respondent Conservation District had no standing to attack the action of the Authority.

7. 238 S. C. 461, 120 S. E. 2d 681 (1961).

Assuming that under some circumstances, one public agency may attack the action of another, the Court concluded that the complaining agency must at least show that it has some special interest from which it is charged with responsibility that may be adversely affected by the action attacked. In the instant case, the Court could not find where the Conservation District was given any statutory jurisdiction over the pollution of streams or other waters of the State, and that the classification and the regulation of the purity and quality of water had been committed solely to the South Carolina Water Pollution Authority. The Soil Conservation District was charged only with the conservation of the soil resources and the control and prevention of soil erosion, a matter which the Court found was not affected by the discharge of sewage into Beaverdam Creek. Thus, the Court concluded that the Soil Conservation District lacked any standing to attack the action of the Authority in the classification of Beaverdam Creek, or to challenge the validity of the permit granted by the Authority to the Board of Public Works.

The correctness of the Court's holding in this case is most readily apparent from a reading of the two statutes involved, to-wit: Section 63-51 through 63-167 of the Code of Laws of South Carolina, 1952, relating to the creation and function of Soil Conservation Districts, and the Water Pollution Control Law, codified as Chapter 3 of Title 7 of the Code of Laws of South Carolina, 1952. Nowhere in the Soil Conservation District Laws are the supervisors of a district either expressly or impliedly given any function or power to concern themselves with the degree of pollution that exists in the streams of the state. On the other hand, the Water Pollution Control Law clearly and specifically grants to the South Carolina Water Pollution Authority jurisdiction over the streams, rivers and waters of the state.

Liability of Municipality in Tort

The questions before the Court in the two cases of *Hollifield v. Keller, et al*[8] arose out of an automobile accident allegedly caused by ice on Devine Street in the City of Columbia. The plaintiffs alleged that the defendant property owner had permitted water to flow from a freezing unit tower on the top of his building out into Devine Street during freezing

8. 238 S. C. 584, 121 S. E. 2d 213 (1961).

weather, where it formed a sheet of ice, and that the plaintiff, Katherine M. Hollifield, driving her automobile along Devine Street, skidded or slipped on the ice and crashed into a telephone pole, allegedly causing her serious and painful injuries. Causes of action were also brought against the City of Columbia under Section 47-70 of the Code of Laws of South Carolina, 1952,[9] on the grounds that the negligent acts and omissions on the part of the city, combined with the negligent acts on the part of the other defendants, proximately caused the injuries.

There are two separate appeals involved. One is in an action by the person injured, Katherine M. Hollifield, for personal injuries resulting from the accident, and the other is in an action by her husband, Joseph A. Hollifield, for loss of his wife's services and his right of consortium.

The appeals were brought by the City of Columbia from orders of the lower courts (the husband's suit was brought in the Richland County Court, and the wife's suit was brought in Richland County Court of Common Pleas), overruling various motions to strike, and demurrers entered by the city.

In both cases the city had demurred on the grounds that the several causes of action, one against the landowner and one against the city, were improperly united in that the said causes of action affect the various parties differently. The Supreme Court affirmed the lower court's overruling of these demurrers, and held that where a municipality and its co-defendants are charged with separate and independent acts of negligence which jointly and concurrently caused the plaintiff's injuries, the city and its co-defendants are subject to being sued as joint tort feasors. Here, although two causes of action are separately designated, the Court held that they, in fact, stated only one cause of action against the city and the co-defendants as joint tort feasors, the only difference being in the amount of damages claimed against the respective defendants.

9. "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 . . . No person bringing an action under this section shall recover property damages in excess of two thousand dollars or damages in case of personal injury or death in excess of eight thousand dollars. . ."

The appellant city took the position that Mrs. Hollifield's alleged pain and suffering were not proper elements of damages in an action against a municipality under Section 47-70. However, the Supreme Court disagreed and affirmed the lower court's action in refusing to strike from her complaint words characterizing Mrs. Hollifield's injuries as "painful." The Court held that mental pain and suffering, connected directly with physical injury, constitute a part of the physical injury for which compensatory damage may be allowed even against a municipality, and that here it clearly appeared from the complaint that the pain alleged to have been suffered was directly connected with the bodily injuries.

Next, the Court considered the right of the plaintiffs to recover punitive damages against a municipality under Section 47-70 on the appellant city's appeal from a refusal of the lower courts to strike from the complaints the allegations characterizing the acts of the city and the other defendants as "reckless, wilful and wanton." However, the complaints did not pray for the recovery of punitive damages, but only demanded actual damages.

The Court concluded that these allegations should have been stricken out as being irrelevant "since punitive damages are not recoverable in an action against a municipal corporation, nor have the respondents sought to recover such damages . . ." Presumably, either grounds was sufficient for the holding.

The unique issue in the husband's suit was whether or not he was entitled to recover for loss of consortium against a municipality under Section 47-70, as a result of injuries allegedly sustained by his wife through a defect in the street. In the lower court the judge had refused to strike from the husband's complaint the allegations relating to his loss of her services and his deprivation of his right of consortium. The Supreme Court, however, reversed the lower court and held that although the husband's loss of consortium as a result of injuries sustained by his wife is a right which gives rise to damages, nevertheless, an action for damages in tort will not lie against a municipal corporation unless the municipal corporation is made liable for the same by statute. The Court held that the statutory provisions involved must be strictly construed, and that the Court was without authority

to enlarge or expand the provisions of the statute by interpretation, but that "amendment by the Legislature is the only proper means to that end." Consequently, inasmuch as Section 47-70 does not in specific language authorize an action against a municipality for the loss of consortium, the Court refused to expand or enlarge the provisions of the statute to permit such an action here.

Once again the Court has demonstrated in this decision its healthy reluctance to engage in judicial legislation.

In the second decision handed down regarding the liability of a municipality in tort, *Brazell v. City of Camden*,[10] the Supreme Court, in an appeal from an order overruling a demurrer, reaffirmed its holding in the *Hollifield* case that Section 47-70 "does not provide for or authorize an action by a spouse against a municipality for medical bills and loss of consortium occasioned by injury to the husband or wife through a defect in a street."

Electric Cooperative Held to Be Not a Public Utility

In the case of *Black River Electric Cooperative, Inc. v. Public Service Commission*,[11] the Supreme Court was presented with an issue growing out of the rivalry of the appellant Cooperative and a privately owned public utility, The Carolina Power & Light Company.

Apparently both the Cooperative and the Power Company had extended their respective transmission lines across a 360 acre tract of land near Sumter which was subsequently developed as a real estate subdivision. The developers, after being offered electric service to the area by both utilities, applied to The Carolina Power & Light Company for electric service.

The Cooperative thereupon petitioned the South Carolina Public Service Commission for an order requiring the Power Company to cease and desist from extending its lines into the development. After a hearing, the Commission denied the petition of the Cooperative on the merits of the controversy.

This action was brought by the Cooperative against, inter alia, the Commission, the Power Company and the developers,

10. 238 S. C. 580, 121 S. E. 2d 221 (1961).
11. 238 S. C. 282, 120 S. E. 2d 6 (1961).

to set aside the above mentioned order of the Commission. The lower court upheld the Commission's conclusions on the merits and affirmed them. On appeal, the Supreme Court affirmed without considering the merits of the controversy on the grounds that the Commission had been without jurisdiction to entertain the Cooperative's petition.

The opinion discusses the history of the Public Service Commission's regulation of electric utilities. It points out that the South Carolina Supreme Court, in the case of *South Carolina Electric & Gas Company v. South Carolina Public Service Authority*,[12] held that the Authority was not subject to the jurisdiction of the Commission, and was not an "electric utility" within the meaning of the statutes requiring an "electric utility" to obtain from the Commission a certificate of convenience and necessity. In similar fashion, the Court held here, Cooperatives organized pursuant to the Rural Electric Cooperative Act of 1939 are free from the control of the Commission, and therefore, can fix their own rates and extend their service lines at will into any rural area, whether or not that area is already adequately served by a privately owned electric utility. However, the opinion notes that legislature did not grant cooperatives the exclusive right to render service anywhere.

The opinion concludes that the proper interpretation of the term "electric utility" entitled to file a complaint as used in the Electric Utilities Act does not include a cooperative, and therefore, the Cooperative here was not entitled, as an "electric utility", to file a complaint with the Commission in the nature of that filed here.

The Electric Utilities Act also permits a complaint to be filed by "any interested person." On the question of whether or not the Cooperative was an interested person within the meaning of the statute, the Court concluded that inasmuch as an electric cooperative is not given an exclusive franchise to serve rural areas, no legal right of the Cooperative will be invaded by the Power Company's competition and the Cooperative is, therefore, not an interested party within the meaning of the statute.

As the opinion points out, any other conclusion would permit a cooperative on the one hand to maintain a monopoly by preventing the entry of competition, while on the other hand

12. 215 S. C. 193, 54 S. E. 2d 777 (1949).

imposing exorbitant rates or rendering inefficient service to those needing electric energy within its service area, and who could obtain it from no one else. However, the opinion is careful to state that a cooperative is entitled to be heard, along with all other persons who have pertinent information, before the Commission when a regulated public utility applies for a certificate of public convenience and necessity. The holding here merly relates to the filing of a complaint before the Commission.

The result of the holding is that while a cooperative can extend its lines without any hearing to compete with private utilities, a private utility, before extending its lines, is subject to a hearing, at which the cooperative can present testimony in opposition.

It also points up the possible need of a statute compelling the cooperative to obtain a certificate of convenience and necessity before extending helter-skelter its lines in areas already properly served.

Eminent Domain Cases

A number of decisions handed down during the period under review deal with the acquisition of property by authorized public or private bodies through eminent domain.

In the case of *South Carolina State Highway Department v. Southern Railway Co.*,[13] the Court had before it the question whether or not interest on the award was recoverable by a land owner where property was taken through eminent domain by the Highway Department. The lower court had charged the jury that interest could properly be included in its award and the Highway Department appealed from the verdict on the grounds that the charge was erroneous.

The Supreme Court noticed that the pertinent statutory provisions under which the Highway Department condemned the property in question made no mention of interest upon the award from the time of taking until the time of payment. Furthermore, the Court noted that this was in contrast with a number of other condemnation statutes which specifically permit the land owner to charge interest upon the award from the date of taking.

13. 239 S. C. 1, 121 S. E. 2d 236 (1961).

The Supreme Court reversed the judgment of the lower court and held that "interest is not to be considered in arriving at just compensation in Highway condemnation cases." This holding was based on the fact that the omission of a provision for interest in the Highway Department Statute would not be presumed to be a legislative oversight to be remedied by the Court.

It is not uncommon in land condemnation cases in general for a considerable lapse of time to occur between the time of the taking and the time of the final award and interest can amount to a considerable item. It would seem to the writers of this review that the dissenting opinion by the late Justice Oxner offers compelling reasons for affirming the judgment of the lower court. Justice Oxner's legal position that the failure of the legislature to specifically allow interest in Highway condemnation cases is not controlling, but that interest should be included within the "just compensation" guaranteed by the Constitution and beyond the power of the legislature to diminish, appears to be well founded on the basis of the Supreme Court's decision in the case of *Chick Springs Water Co. v. State Highway Department.*[14]

The case of *Owens v. State Highway Department*[15] results from a rather unique factual situation. The Town of Myrtle Beach and the United States Corps of Engineers had obtained rights of ways for and had constructed a relocation of Highway No. 707, and the relocated highway was turned over to the State Highway Department in consideration of the Department abandoning the original road bed which was needed for a runway extension at the Myrtle Beach Air Base. The record supports the conclusion that the Highway Department had nothing to do with the construction of the relocated highway, but that its responsibility in connection therewith commenced only when the same was turned over to the Department and was subsequently maintained by it.

The adjoining property owner brought this action against the Highway Department for alleged negligence in the construction of the relocated highway and obtained a verdict in the lower court for actual damages. The damages alleged arose from improper drainage of the relocated highway which resulted in flood damage to the property of the land owner

14. 159 S. C. 481, 157 S. E. 842 (1931).
15. 239 S. C. 44, 121 S. E. 2d 240 (1961).

adjoining the right of way. The property owner, however, limited his action to alleged negligence in the construction of the highway and did not base his claim on any defective maintenance of the same after it was turned over to the Highway Department. From the judgment of the lower court awarding a verdict to the property owner the Highway Department appealed.

The Supreme Court recognized the well established rule that Article 1, Section 17, of the South Carolina Constitution guarantees a property owner against loss resulting from a taking and from a damaging without distinction between the two terms on the basis that a deprivation of ordinary beneficial use and enjoyment of one's property is equivalent to the taking of it.

However, the Supreme Court reversed the award of the lower court on the grounds that there was insufficient evidence in the record to connect the State Highway Department with the construction of the relocated highway so as to render it liable to the property owner for damaging or taking his property; and held, therefore, that the trial Judge erred in refusing to grant the Highway Department's motion for a directed verdict. The concurring opinion by the late Justice Oxner points out that a recovery might be sustained in a proper case brought on the theory that the Highway Department refused to rectify the defective condition after it took over the road, or on the theory that the Highway Department by adopting the original taking subjected itself to the obligation to pay just compensation originally incumbent upon its predecessor.

The case of *South Carolina Highway Department v. Spann*[16] arises out of a condemnation proceeding, but has greater significance under the subject of pleadings. The holding is to the effect that the lower court was powerless to extend the time for taking an appeal from the award of the Board of Condemnation beyond the statutory period. The property owner had not appealed within the prescribed twenty day period and had obtained an extension from the lower court on the grounds that the resolution making the award was ambiguous or misleading. The Supreme Court in reversing held that the property owner's remedy was only by way of appeal within the twenty day statutory period.

16. 239 S. C. 437, 123 S. E. 2d 648 (1962).

In the case of *The South Carolina State Highway Department v. Hammond*,[17] the Highway Department had proceeded against the owner and lessee of property to acquire a right-of-way. The lower court dismissed the landowner's motion for a trial separate and apart from the trial involving the lessee. On appeal, the Supreme Court affirmed.

The opinion holds that a lessee has an interest in condemned property and is, therefore, properly made a party to condemnation proceedings, and that inasmuch as the Highway Department is entitled to an assessment of all damages arising from the taking in a single proceeding, all interested persons should be made parties.

Regarding the landowner's claim for a separate trial, the Court held that the lower court properly refused the landowner's motion for a severance, and pointed out that a separate trial to each owner of an estate or interest in condemned land is not required, and will not be granted unless the moving party can show that legal prejudice will result from a joint trial. The Court, however, and without elaboration, refused to pass on the question whether a collective or joint verdict should be rendered at the trial of the case.

Does this mean that a lump sum verdict in favor of the landowner and tenant would be upheld? If this is true, then are not the landowner's and the lessee's constitutional rights to be paid for their respective property rights jeopardized? It is true that the landowner and lessee could later litigate the quantum of their respective shares, but if this is to be the rule, then it would seem that the promotion of justice would be better served if there were a statute authorizing the verdict to be appropriately divided by the jury so that both the landowner and the lessee would be awarded compensation for their respective interests in the award for the taking of property.

In the case of *Atkinson v. Carolina Power and Light Co.*[18] the Supreme Court considered the right of a private electric Company to condemn the fee simple title of land needed for the purpose of impounding waters to form a lake to be used in conjunction with the Company's generating plant.

It appears that the water in the lake itself normally would cover land up to about the contour elevation 222. The Com-

17. 238 S. C. 317, 120 S. E. 2d 21 (1961).
18. 239 S. C. 150, 121 S. E. 2d 743 (1961).

pany, however, sought to acquire the fee title not only to the lake bed itself, but also to a body of land back of the water's edge surrounding the lake between the contour elevations 222 and 230. The question in issue was the right of the Company to condemn the fee in any of the property sought.

The Supreme Court, adopted the order of the lower court and held that the defendant company was properly authorized by the legislature to exercise the power of eminent domain "subject to supervision of the Courts to avoid fraudulent or capricious abuse . . ." regarding what land and how much land will be condemned. Furthermore, the decision holds that the burden is on the landowner to allege and establish bad faith and abuse of discretion. In the instant case the Court found that the evidence adduced by the defendant company clearly establishes its need for the fee simple title to the property being sought and the inadequacy of an easement or flowage rights. The opinion notes that the right of the private corporation to condemn land for public use has been recognized in this State for more than fifty years.

Zoning Ordinance Enforced

In its decision in the case of *City of Florence v. Turbeville*[19] the Supreme Court considered a number of interesting questions relating to enforcement of zoning ordinances.

On August 18, 1952, a comprehensive zoning ordinance for the City of Florence was adopted. At that time and until October 1959, the property owners conducted a dancing school in an area of the city devoted to business (at No. 331-A West Evans Street). Subsequent to the adoption of the zoning ordinance and on February 18, 1953, Appellants purchased a house and lot on Madison Avenue in the City of Florence within a R-1 Residential District. This property was used as a residence with limited use for private dancing lessons until about October 1959, when the complete operation of the dancing school was shifted from Evans Street to the Madison Avenue property.

The school consisted of about 220 children and classes were held six days a week. However, there were no signs of advertising and there was no disturbance caused by noise. The only apparent effect was considerable traffic when the children

19. 239 S. C. 126, 121 S. E. 2d 437 (1961).

were brought and picked up. The lower court permanently enjoined the operation of the school at the Madison Avenue address. On appeal by the property owners the Supreme Court affirmed.

First, the Supreme Court found no merit in the contention that the ordinance was never validly adopted which was urged on the grounds that the City had no existence as a municipality from January 8, 1952 until March 20, 1953. This contention was based on the fact that the Act chartering the City was omitted from the 1952 Code effective on January 8, 1952, and that the City ceased to exist until revived by the 1953 Legislature. The opinion points out that there is no requirement that the Code contain special statutes incorporating individual cities and towns, but that it must and can only contain the general statutes. Further, the opinion holds that the existence of the City can only be attacked directly and not in the proceeding here; and finally that the 1953 legislation validated all acts of the Mayor and City Council during the period in question.

Secondly, the Court struck down the appellants' contention that they were in the dancing school business before the ordinance was adopted and should be allowed to continue as a lawful non-conforming use, and notes that the zoning ordinance antedated the establishment in 1959 of the school at the Madison Street address.

Next, the Court affirmed the findings below that the dancing school was of such size, scope and regularity that it does not fall within the exemption of a customary home occupation.

The appellants also contended that their dancing school was being carried on in an orderly and unobjectionable fashion and its suppression was not reasonably related to the public safety, health, convenience, prosperity or general welfare. Upon a consideration of the authorities upholding general exclusions so drawn as to exclude innocuous establishments, the Court concluded that the zoning classification was reasonable and should be enforced. It noted that the purpose of the zoning laws was to preserve the character of a residential neighborhood and that the intrusion of commercial enterprises could eventually cause a break-down of the City's comprehensive zoning scheme.

Finally, the appellants contended that the application of the zoning ordinance here was unconstitutional invasion of their constitutional rights. However, the Court noted that zoning ordinances generally have been upheld as a proper exercise of the police power, and held that the appellants had not sustained the burden of proving that their dancing school fell within a permitted classification (churches, certain types of schools, libraries, country clubs, etc.). The Court could find no authority to warrant a conclusion that a dancing school should not be distinguished from the permitted classifications.