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Huger Sinkler
Sinkler, Gibbs & Simons (Charleston, SC)

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HUGER SINKLER*

Annexation Problems

In the case of *Harley v. City of Spartanburg*[1] the problems disposed of by the Court arose in a contest relating to the validity of an annexation proceeding undertaken by the city of Spartanburg. The questions disposed of by the Court all concern the sufficiency of the petition of the freeholders of the annexed area. Unlike certain other states, notably Virginia and Texas, which permit incorporated municipalities of certain classes to extend themselves, and to incorporate into their corporate limits adjacent territory, the statute of South Carolina imposes many conditions upon annexation. Perhaps the most onerous condition is that set forth in Section 47-12 which requires, as a condition precedent to the election called for by the statute, the presentation of a petition signed by a majority of the freeholders of the territory to be annexed. The burden of securing the actual signatories to such a petition is obvious. Other difficulties not apparent in the statute also exist, because very seldom are the tax books of a county set up in such fashion as to reflect actual land holdings in any given area of relatively small size. Furthermore, the statute offers no specific definition of the term "freeholder." All of these problems were present in this case and it was doubtless with this in mind that the Court observed: "We desire to say that even if our calculations had shown that the petition was a little short of the required number, we would hesitate under the circumstances of this case to set aside the finding of the City Council [that the petition did in fact contain the signatures of a majority of the freeholders] which is *prima facie* correct. The possibility of a slight mistake on our part is too great. Probably no two persons would reach the identical result; as pointed out in the *Rawl* case mathe-

*B.A., College of Charleston; Legal Education, University of South Carolina, School of Law; member City Council of Charleston, 1939-43; member State Legislature, 1932-36 and 1945-46; member of Charleston County, South Carolina, and American Bar Associations. Member of firm of Sinkler, Gibbs & Simons, Charleston, South Carolina.

1. 230 S. C. 525, 96 S. E. 2d 828 (1957).

matical precision is improbable if not impossible in a case of this kind."

Among the more interesting dispositions made by the Court was its holding that persons who were vendees under an executory contract of sale could not be considered freeholders under this particular statute. The Court noted that such a vendee, even though he had made a down payment, had only an equitable interest in the land.

A practitioner interested in the problems resulting from annexation proceedings should also refer to the earlier case of *Truesdale v. Jones*[2] in which the Court sets forth a synopsis of the steps which the statute requires to be taken in annexation proceedings.

Irregularities in Annexation Election

In the case of *Rutland v. City of Spartanburg*[3] here again is a contest resulting from an annexation proceeding relating to the city of Spartanburg. The questions here related to the manner in which the annexation election was conducted. It was among other things contended that an earlier election which involved substantially the same territory, had resulted unfavorably and that the election here, held a mere two months later, was untimely. The Court noted that there was no statute limiting the number of annexation elections which might be held in any area, or prescribing that any given period of time must elapse between two such elections. On that basis the Court sustained the holding of the election, although it observed that there was no allegation that the time lapse since the earlier election was unreasonable. Since it also fortified its conclusion on this point by the observation that the area involved in the challenged election varied somewhat from that involved in the earlier election, there seems to be left open the possibility that a succession of elections might meet with judicial disapproval.

It seems to the writer that the question here is one solely for Legislative consideration. Certainly a legislative provision requiring a reasonable spacing of elections would be in order.

Another question disposed of in the case concerned the failure to number the ballots in the manner required for

2. 224 S. C. 237, 78 S. E. 2d 274 (1953).
3. 230 S. C. 255, 95 S. E. 2d 443 (1956).

ballots used in general elections. However, the Court correctly notes that the provisions of Section 23-309 (2) of the 1952 Code relates entirely to the form of ballots used in general elections. There are no comparable provisions in the Code relating to the numbering of ballots used in other elections.

Other questions involved in the case were disposed of by a restatement of the time-honored rule that an election will not be declared invalid because of errors or irregularities that do not affect the result of the election or bring it into doubt.

Power of Municipal Corporations to Sell Public Property

Bobo v. City of Spartanburg[4]. In an effort to improve traffic conditions within the shopping area of Spartanburg, the city agreed with a private corporation to convey a portion of the public area known as Morgan Square in exchange for certain real estate owned by the private corporation. The agreement defining the terms of the transaction provided that the legality of the city's undertaking should be adjudicated and the suit here sought judgment determining the city's right to effect conveyance of a portion of the public area. Noting that in South Carolina there is no distinction between governmental and so-called private functions of incorporated municipalities, and that municipally-owned property is deemed held in a fiduciary capacity for the benefit of all citizens of the municipality, the Court resolved the question by finding explicit statutory authorization for the conveyance. The statute referred to empowers cities to sell and convey all property at will. On this basis the Court refused to consider the propriety of the transaction, noting that since the power had been given by the Legislature to the city, it was not within the province of the Court to inquire into the advisability of the city's action. The Court supported this position with earlier cases which indicate that in the absence of fraud or abuse of authority, the actions of governmental bodies of incorporated municipalities are not open to question.

One basis for the result rests upon the statement that the deed under which the city acquired the property contained no dedication of the area in question to a specific public purpose, or other restrictive provision as to user. Had such

4. 230 S. C. 396, 96 S. E. 2d 67 (1956).

existed, presumably the city would be required to observe the conditions of the deed.

Right to Repeal Ordinances

In the case of *Wright v. City of Florence*[5], the City Council of Florence, on July 1st, 1950, under the recited authority of the statute now codified as Section 47-21, adopted an ordinance establishing a Civil Service Commission with jurisdiction over the police and fire departments of the City of Florence. On December 8th, 1955, a succeeding Council repealed the ordinance of July 1st, 1950, and its action in so doing was challenged on the ground that it did not have the statutory right to repeal the earlier ordinance.

The Court reviewed the statute and found that the authorization to adopt the ordinance contained no provision prohibiting its repeal and consequently reached the conclusion that the express power to adopt was coupled with the implied power to repeal unless the repeal impaired the validity of a contract in pursuance of the ordinance or resulted in a deprivation of property without due process of law.

The Court's decision is clearly in accordance with the general rule, and it is an established principle that a legislative body cannot, through the device of an irrevocable ordinance or statute, bind its successors.

Also involved in the appeal was the contention of the Chief of Police that the repeal of the earlier ordinance unconstitutionally impaired his contractual rights to his position. While the Court did not pass upon this question, because of the fact that it had not been specifically passed upon by the Court below, which had denied the right of the City Council to repeal the ordinance of 1950, the Court did observe that in the absence of a constitutional or statutory restriction, a municipal corporation which was given the power to create an office might abolish that office, and that tenure of office statutes and Civil Service statutes do not prevent a *bona fide* abolition of the office by the municipality. The right to hold public office is not a constitutional right and the appointment to office created by statute is generally subject to the condition that the office may be abolished.

5. 229 S. C. 419, 93 S. E. 2d 215 (1956).

Validity of Curfew Ordinance

The case of *Painter v. Town of Forest Acres*[6] involves the interesting question as to whether the town of Forest Acres was empowered to adopt a curfew ordinance. The challenged ordinance provides that it is unlawful to operate a place of business or keep open for the purpose of operating any business of any kind anywhere within the town of Forest Acres during the hours between midnight and six o'clock in the morning.

The respondent in the case challenged the validity of the ordinance on the ground that the ordinance was an invalid exercise of police powers and that it was unconstitutional and violative of respondent's rights under the due process sections of the State Constitution. The facts of the case established that the respondent's place of business was a drive-in restaurant of long standing. The Master and the Court below found that the ordinance unjustly deprived the respondent of her right to operate a business. The Supreme Court sustained this conclusion and held that a municipal corporation could not make a business a nuisance by merely declaring it to be such, that property consists not only in ownership and possession, but in the unrestricted right of use, enjoyment and disposal. It held that anything which destroyed one or more of the elements of property to that extent destroyed the property itself. The Court stated that the enforcement of an ordinance to require all businesses to close at midnight would seriously impair if not destroy many lawful businesses and was so unreasonable as to violate the owner's constitutional privileges. The Court noted that this particular ordinance seemed to be directed at the respondent with the specific purpose in mind of closing her place of business. The conclusion of the Court in this case is not open to challenge. However, it should be observed that municipalities do have power to regulate the operation of businesses and, as a general rule, when a municipality duly clothed with such power prescribes that which constitutes a nuisance, its decision will be upheld. Furthermore, there is a general presumption to the effect that the action taken by a municipality in declaring the operation of businesses to be nuisances are valid, and while one has no quarrel with the results of this particular case, it should not be regarded precedent for the

6. 231 S. C. 56, 97 S. E. 2d 71 (1957).

proposition that businesses operated within municipalities are not subject to proper regulations. All forms of government involve a partial surrender of basic rights. This is particularly true in the case of municipal government where people who live in close proximity find it necessary to surrender rights in order to enjoy the privileges and protection afforded by municipal government. While the courts do have the power to strike down regulatory ordinances where unreasonable, this is a power which should be carefully and cautiously exercised.

Zoning

The case of *Stevenson v. Board of Adjustment*[7] involved a neighborhood contest between a group of residents of a section of Old Historic Charleston and The First Baptist Church of that city, over the right of the church to extend its Sunday School Building, which was used both for religious purposes and for a private day school which the church had been operating without a permit. The aggrieved property owners had contended that the extended buildings increased lot occupancy beyond that permitted by the Charleston Zoning Ordinance. They likewise contended that even if it were within the discretionary power of the Board of Adjustment to grant the permit, its action in so doing in this case constituted an abuse of discretion. The property owners further challenged the right of the church to operate a day school in the building.

The Supreme Court noted the first questions presented to it for decision as follows:

> Should under the facts and circumstances of this case, The First Baptist Church of Charleston be permitted to extend its Sunday school plant to an extent beyond that permitted by the Zoning Ordinance of the City of Charleston?
>
> Is the decision below granting permission to The First Baptist Church of Charleston to operate a day school in its Sunday school plant to be upheld?

Both questions had been resolved favorably to the church by Charleston's Board of Adjustment, and had been sustained by the Court of Common Pleas on appeal from the Board's decision.

7. 230 S. C. 440, 96 S. E. 2d 456 (1957).

The final question in the case related to a limitation upon the use of the enlarged plant which had been imposed by the Board of Adjustment which had held:

> Because of the absence of any recreational ground on the premises, congestion of the grounds with existing buildings, and the new proposed building, as well as tomb stones and all of the other facts adduced in testimony in the aforementioned hearing, it is directed that the maximum number of day students permitted to occupy the premises not exceed 270.

This limitation upon the use of the building had been stricken by the Court of Common Pleas on the ground that it was harsh and unreasonable.

The decision of the Supreme Court sustained the Board of Adjustment in all respects.

First of all, the Court noted that there were two lot occupancy provisions involved. The first prohibited lot occupancy beyond thirty-five percent of the lot. Variances beyond this limitation were admittedly within the Board of Adjustment's discretion. The second was a flat prohibition against lot occupancy beyond fifty percent.

The facts of the case showed that the extended buildings brought the lot occupancy to something just less than fifty percent, but, if as contended by the neighborhood, graves, grave stones and other monuments were brought into consideration in determining lot occupancy, that in such event the lot occupancy would extend beyond fifty percent.

The Court concluded that the Board of Adjustment was justified in granting a variance from the thirty-five percent limitation on the ground that a strict application of the Zoning Ordinance would result in the church suffering singular disadvantage. It further concluded that graves, grave stones and other similar monuments were not buildings within the meaning of the Zoning Ordinance and need not be taken into consideration in determining lot occupancy.

The Court also concluded that the Board was justified by the terms of the Ordinance in granting to the church the right to use the premises for a day school. In doing so it noted that schools were permitted uses under the Ordinance which, in the discretion of the Board, might be allowed.

Finally, the Court reversed the Court of Common Pleas and reinstated the condition as to occupancy imposed by the

local Board. It reviewed the evidence and findings of the Board and noted the crowded condition under which the school was occupied, and held that the Board was fairly justified in imposing the limitation noted above. In so doing it cited with approval the statement of the text in *58 American Jurisprudence* which declares that the rule of law permits the imposition of reasonable conditions upon the granting of an exception to or variance of a zoning restriction as to a particular piece of property. The conditions under which such limitations may be imposed must relate to the land itself and to the use thereof, and cannot be imposed as against any particular person.

The case here involves no unusual question of zoning law. The opinion is clear and well written.

Consequences of Merger

The case of *City of Columbia v. Sanders*[8] arose in the attempt to settle a vexatious problem arising from the merger of the municipalities of Columbia and Eau Claire which took effect as of December 2nd, 1955. The specific problem facing the growing city of Columbia related to its right to issue further waterworks and sewer system revenue bonds.

In 1949 the city of Columbia issued $2,000,000 of waterworks and sewer system revenue bonds. In the proceedings authorizing these bonds, the City reserved the right to issue, from time to time thereafter, subject to certain stated conditions, additional revenue bonds on a parity with those then being issued. Columbia had availed itself of this parity provision on two occasions. In 1953 another $2,000,000 of bonds were issued and again in 1954 $1,500,000 of bonds had been issued. All of the outstanding bonds of these issues are of equal rank and on a parity among themselves. At the time of its annexation Eau Claire had four issues of bonds, payable from the revenues of its waterworks and sewer system. In none of the proceedings authorizing the issuance of the Eau Claire bonds were there provisions made to permit the issuance of further bonds on a parity with those then being issued. The result was that the Eau Claire bonds ranked in the order of their issuance and constituted respectively, first, second, third and fourth liens upon the revenues of its system. In the proceedings relating to the merger or con-

8. 231 S. C. 61, 97 S. E. 2d 210 (1957).

solidation of Eau Claire with Columbia, it was provided that all property of Eau Claire should become the property of the enlarged city of Columbia, and that the city of Columbia should assume all bonded indebtedness of Eau Claire as well as all other outstanding obligations. It was also provided in the merger agreement that identical water rates should prevail throughout the consolidated city, it being provided that the rate should be sufficient to meet all present and future revenue bond covenants existing in both Eau Claire and Columbia.

Notwithstanding the provisions in the merger agreement, the City Council of Columbia, in adopting the resolution declaring that Eau Claire had been annexed to and had become a part of Columbia, provided that the waterworks and sewer system of Eau Claire should be operated and maintained as a separate system for so long a time as any of its revenue bonds should remain outstanding, but that upon payment of all of said bonds the system should be combined and merged into the waterworks and sewer system of the city of Columbia as part and parcel thereof.

Finding itself required to extend its waterworks and sewer system, the city of Columbia contemplated the issuance of further bonds payable from the revenues of that system, and it sought in this declaratory judgment suit a determination of whether there had been, in fact, a merger of the two utility systems. The Court below had held that the merger of the municipalities had been accomplished without the merger of the two utility systems, and that the right of the city of Columbia to issue revenue bonds on a parity with the bonds of its three outstanding issues had not been changed or affected in any way whatsoever.

The Supreme Court did not agree with the results reached below. It noted that the law was well settled that upon consolidation of two municipal corporations the enlarged corporation, in the absence of contrary legislative provision, or agreement, takes all of the property of the combining constituents, and that the contracts and indebtedness of the corporations which are consolidated or annexed become the contracts and indebtedness of the consolidated corporation. It notes that the identity of the component elements is lost and becomes absorbed into the new creation. The Court con-

cluded that on the facts of this case not only was there no agreement preventing the application of the general rule but that the terms of the merger agreement specifically contemplated the assumption of all obligations by Columbia and specifically a merger of the two utility systems.

The Court held:

> There has been a merger of the two utility systems. In the further issuance of revenue bonds by the City of Columbia, there must be taken into consideration the debt service requirements of the Eau Claire bonds, and the earnings test must be applied to the consolidated system.

The case is obviously one of limited application and the important point to be noted is the statement of general law relating to the effect of merging two municipal corporations. Equally important to note are the provisions of Section 47-13 of the Code which permit the two merging units to provide by contract the effect of merger upon the component parts to the merger. In this particular case, the provisions of the merger contract relating to identical water rates justify the Court's conclusion that there had been an attempt to merge the two utility systems. The result, of course, makes it difficult for Columbia to spell out to its new bondholders their precise rights. Since the earnings test relating to the issuance of the additional bonds requires that the debt service of the Eau Claire bonds be taken into account, it is clear that the Eau Claire bondholders have rights with respect to the revenues of the combined system, notwithstanding their obvious rights to claim the revenues of the system serving the territory that formerly constituted Eau Claire.

The Court in its decision expressed doubt as to the propriety of a declaratory judgment to determine the City's rights under the merger agreement. It stated:

> We have been in considerable doubt as to whether the pleadings present a proper case for any kind of declaratory relief. But since the rule requiring the existence of a justifiable controversy in a declaratory judgment suit is somewhat relaxed where the public interest is involved, we have decided to make the foregoing limited declaration with respect to the further issuance of further revenue bonds.

This statement is somewhat surprising in view of the fact that the Supreme Court of South Carolina, like the courts of last resort of other states, have always been willing to assist public corporations in resolving questions which relate to public financing. The reason for this is obvious. Because of their character, municipal bonds have an accepted market but only when there is no question whatsoever with respect to their legality. Those expressing opinions upon the validity of municipal bonds, unlike the lawyer examining a real estate title, may not discuss the law and give an opinion leaving it to the client to weigh any risk attached to the transaction and decide for himself. The lawyer rendering an opinion upon municipal obligations is required to express himself in categoric and unqualified fashion. In effect his opinion states that there is no reasonable question that could possibly exist with respect to the validity of the bonds being issued. As a consequence, if any question exists which could be resolved against the validity of the bonds, it is his duty to refrain from approving the bonds in the absence of a clarifying decision by the appropriate Appellate Court of last resort.

Prior to the enactment of the Declaratory Judgment Act suits of this sort were brought in equity seeking to enjoin the municipal officers from issuing bonds on the ground that they would be illegal or unconstitutional. The Declaratory Judgment Act seems tailored to the letter to fit this type of law suit. And it is for that reason that this comment is being made. Of course, the Court is right in stating that the Declaratory Judgment Act does not require the Court to give advisory opinions. But such was not the case here. The City of Columbia was faced with the necessity of issuing a substantial amount of revenue bonds. If it did not know the effect of the merger between itself and Eau Claire, it could give no assurance to those who might buy its bonds as to the rights that they had to the revenues of the utility system. Thus, the City of Columbia was not seeking an advisory opinion but merely a declaration of its legal rights as to a course of procedure which it had to institute forthwith.

Measure of Damages in Municipal Condemnation for Street Purposes

By a 3 to 2 decision, the Court, in the case of *Smith v. City of Greenville*[9] decided that special benefits derived by a property holder whose land was taken for street purposes might be offset against damages resulting, including those directly attributable to the taking of the land itself.

The dissenting Justices concluded that special benefits might be offset only against the damages to the residue of the land and not against the value of the actual land taken for street purposes.

In writing the majority opinion, Justice Legge made an obviously exhaustive research of the problem. He noted that until the adoption of the Constitution of 1868 an individual had no right, against the State's power of eminent domain, to compensation for the taking of his land for a public highway. He also noted the two mandates of Section 17 of Article I of the present State Constitution. The pertinent provision declares that "private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor."

In comparing this provision with the text of Paragraph 20 of Article IX, which relates to the acquisition of rights-of-way by private companies, Judge Legge noted the inclusion in Paragraph 20 of the provision requiring corporations to pay full compensation for any taking, "irrespective of any benefit from any improvement proposed by such corporation." Largely on the basis of this comparison the majority held that special benefits should be taken into account against the value of the land taken.

The dissenting Judges did not dispute the logic of Judge Legge's analysis of the constitutional provisions, but based their dissent upon their construction of the statute, after first noting that a statute relating to compensation might be more generous than a constitutional provision requiring compensation for property taken for public use.

The statute involved requires payment for the actual value of the land taken and for special damages resulting therefrom, but states that due allowance shall be made for any special benefit which might accrue to the owner. On the basis

9. 229 S. C. 252, 92 S. E. 2d 639 (1956).

of this language the majority result seems correct, for surely with the text of the language of Section 20 of Article IX before it, the General Assembly would have used precise language had it wished a land owner to be compensated for the value of the land taken "irrespective of any benefit from any improvement proposed."

In the case of *Heath Springs Light & Power Co. v. Lynch's River Elec. Corp.*[10] the private corporate utility contested the right of the Cooperative to serve customers in the territory as to which it asserted an exclusive right of franchise. The private utility held a Certificate of Convenience and Necessity issued to it by the Public Service Commission of South Carolina, which was asserted to be an exclusive right of franchise as to the disputed area.

Notwithstanding this assertion, the Court concluded that the statute under which the electric Cooperative was organized permitted it to sell in the service area allotted to the private utility. The decision rests upon the statutory scope of the power granted to the electric Cooperative but it reviews earlier cases which are historical landmarks of the early days of the so-called New Deal era. This review established overwhelming Court support for the proposition that competition from a public agency with a private utility constitutes *damnum absque injuria,* notwithstanding that competition might injure or even destroy the private utility.

Since some of the litigation discussed in the opinion reached the highest courts of the land, it is no longer doubtful that private utilities must look solely to the Legislature for protection against undue public competition.

The view taken by courts dealing with public ventures into fields which are regarded by many as the peculiar domain of private enterprise, swings back and forth with the pendulum of economic conditions. In the early case of *Copes v. Richardson*[11] when the pre-Civil War effort of the City of Charleston to build a network of railroads to its port was undertaken, the Court somewhat naively observed that "a [municipal] corporation is an artificial person capable not only of exercising given powers but also of owning real and personal property." On this basis the Court concluded that

10. 231 S. C. 34, 97 S. E. 2d 79 (1957).
11. 10 Rich. Law 491 (1857).

the only question legitimate and proper to its inquiry was whether the plan was suitable to "the welfare or conveniency of the City." The Court held that question was one for the City Council. Compare this attitude with that existing in the post-Civil War days when many of the earlier undertakings of municipal corporations had brought grief to their taxpayers. In the case of *Feldman v. City Council of Charleston*[12] (1884), the Court had before it the validity of a bond issue by the City of Charleston whose proceeds had been loaned to individuals to enable them to rebuild that portion of Charleston which had been destroyed by the great fire of 1863. The bonds had been issued and were outstanding in the hands of the public and the Plaintiff had sought to establish liability of the City upon the coupons representing interest due. Notwithstanding all of this, the Court concluded that the undertakings of the City were beyond its constitutional powers and held that since the purpose for which the bonds were issued was not essentially a public purpose, the bonds were invalid.

No moral is attempted; merely the observation that economic conditions existing at any given time have a marked effect on litigation relating to the nature and extent of the powers of public corporations.

12. 23 S. C. 57 (1884).