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Property

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Few v. Few[1] was an action for the partition of a large farm tract in Williamsburg County. On this tract was an expensive house which was occupied by the defendant, Marion Few, as his home. The referee and circuit judge allotted the house to the defendant at a valuation of 25,000 dollars. The referee found that the remaining property could be divided in kind, but recommended nonetheless that it be sold. The circuit court found that the property could be divided in kind, and accordingly ordered that it be so divided by commissioners in partition. The South Carolina Supreme Court reversed and ordered that the property, including the house, be sold at public sale. The case deserves close attention to determine whether it pronounces any new rule or presents any new tendency in the law of partition.

Although the parties to the action are Carolyn Few and Marion Few, all of the transactions in dispute took place between Carolyn's husband, Ben Few, and the defendant. The farm had been operated for a number of years by Marion, the defendant, but Ben had furnished all of the money except for the amount Marion put into the construction of the house. The action was for an accounting as well as for a partition, and much of the testimony concerned the financial transactions between the brothers. These were dishearteningly confusing. The referee's distaste for this fraternal muddle lead him to refuse to decide most of the disputed facts, so that his report contains virtually no findings. Instead, its conclusions are based on the referee's general impressions of the case, and the order of the circuit court dealt with the case in this same fashion. The resulting lack of factual and conceptual clarity, while probably dictated by the circumstances of the case, must have hindered the supreme court from deciding the case in a more forthright and direct manner.

The first question as presented for decision may be subdivided into two parts: (a) Did the court err in allotting the dwelling to the defendant, and (b) was the valuation placed on the dwelling in error? The South Carolina Supreme Court held that the court erred in alloting the dwelling to the defendant. In holding this it considered the difficulties of placing a proper valuation

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1. 242 S.C. 433, 131 S.E.2d 248 (1963).

on the dwelling. The South Carolina Supreme Court did not reverse the concurrent finding of the referee and the circuit judge that the market value of the dwelling was 25,000 dollars. The valuation of the dwelling is not discussed in the opinion for the purpose of arriving at a new and different value. Rather, the assigned valuation is taken as given, but the assignment of the dwelling to the defendant at that value is found to be inequitable.

The South Carolina Supreme Court first emphasized that the defendant, Marion Few, was not in the position of a co-tenant who was entitled to reimbursement or to the allotment of an improved portion of the property by reason of having himself made improvements. Neither the referee nor the circuit court found that the defendant had paid more than his share of the 57,000 dollars which the house had cost to build. The failure of the referee to make this finding was not an oversight, and it should not be assumed that the referee made this finding by implication. As stated above, the referee with evident intention refrained from reaching a decision as to any of the financial transactions between the parties. The South Carolina Supreme Court's statement that the defendant was not in the position of an improving tenant was completely justified. The referee allotted the dwelling to the defendant not because he was an improving tenant, but because the house had been constructed as a home for him; his own home had been sold; he had moved to the house; and he was living in it, all with the prior knowledge and consent of the plaintiff. The referee concluded that under these circumstances equity demanded that the house be allotted to the defendant.

There is a rule of partition that an allotment of a portion of property may be made to a co-tenant on general equitable principles, and circumstances such as those considered by the referee are not without importance.[2] An example of allotment of improved property made on general equitable principles to a co-tenant who was not entitled to claim as an "improving tenant" may be found in the case of *Guignard v. Corley*.[3] In the *Guignard* case the co-tenant receiving the allotment of an improved portion of the land had originally constructed the improvements as a trespasser. He had then acquired an interest in the property, but he had no right to claim as an "improving tenant" the improvements which he had made as a trespasser.

2. Lewis v. Sellick, 69 Tex. 379, 7 S.W. 673 (1887).
3. 147 S.C. 12, 144 S.E. 586 (1928).

After considering the circumstances and the law the court held:

> The logical result of the foregoing conclusions would be to deny the Guignard estate all compensation for the cost and value of the improvements placed upon the strips occupied by the spur tracks; but it does not necessarily follow that the Court would not have the power to allot these particular strips to the estate under all the circumstances. . . .

The court added:

> The situation is peculiar, and strongly appeals to the Court to exercise its great chancery powers to order what is equitable and just.[4]

It appeared that were any other person to obtain these improvements it would give such other person a strangle hold on certain spur tracks which were vital to the business being operated by Guignard. Therefore the improvements were allotted to the Guignard estate upon payment into court of their value.

The South Carolina Supreme Court recognized that the referee had based his decision on general equitable principles rather than on the proposition that the defendant was entitled to have the house allotted to him as an improving tenant, and stated, "We recognize the broad authority conferred upon the court to partition in kind or by allotment."

Why then did the court devote so much space to the discussion of the doctrine of an "improving tenant"? While it seems evident that the referee came to his decision on general equitable principles, he made no explicit reference to his theory of the case. The order of the circuit judge goes beyond the referee's report and refers to the fact (which the referee did not mention) that the defendant testified that the plaintiff had contributed 14,000 dollars to the construction of the 57,000 dollar house. (Note that the circuit judge did not find this to be the case, but merely referred to the defendant's testimony.) The circuit judge then quoted the case of *Tedder v. Tedder*[5] and this is the only case cited in the respondent's brief on the question of the propriety of allotting the dwelling to the defendant. The case of *Tedder v. Tedder* involves an improving tenant. This doctrine was the explicit basis of the decision of the circuit court and was argued by the respondent on appeal. Consequently, it was incumbent upon the South Carolina Supreme Court to devote attention to it.

4. *Id.* at 26, 144 S.E. at 591.
5. 109 S.C. 451, 96 S.E. 157 (1918).

After pointing out that the defendant was not in the position of an improving tenant, the South Carolina Supreme Court then held that even if he had had such a claim, its disallowance would not be inequitable to him nor would it unjustly enrich his co-tenant. By agreement the defendant had managed the farm and the plaintiff had furnished the money. The defendant had put no money into the property except what he spent in the construction of the house. Under his own testimony this amounted to some 43,000 dollars. The plaintiff had put in excess of 103,000 dollars net into the operation of the farm and improvements, and had furnished the entire purchase price of the land. It was clear that the expenditures of the plaintiff had been out of all proportion to those of the defendant, and that she would not be unjustly enriched by sharing in the defendant's contribution.

The most important aspect of the allotment of the house to the defendant was the valuation placed on the house. Here the testimony was conflicting, but the conflict was not over facts. It was a conflict of opinion. The witnesses who appraised the house were divided into two factions, local witnesses and outside experts. The local witnesses believed that the house would not bring more than 25,000 dollars and based their appraisal on the local market. The outside experts believed that the house would bring 40,000 dollars to 65,000 dollars and based their appraisal on the supposition that the property could be sold to a non-resident man of wealth. The local witnesses were appraising a farm house on a farm. The outside experts were appraising a residence on a country estate.

The referee and the circuit judge adopted the value of the house on the local market, and no doubt the local market is the best measure of what the property might bring at public sale. It was undisputed that the replacement value of the house and its real worth was around 65,000 dollars. The house had cost 57,000 dollars to build. It was evident that only by a fortunate sale would it be possible to realize the intrinsic value of the house. Assuming that the house would not bring more than 25,000 dollars at public sale, there would be a substantial loss, and the purchaser would have a splendid bargain. Such a purchaser possibly could obtain a 40,000 dollar profit in cash by a sale on that thin, slow, affluent market for country estates which had been evoked by the outside appraisers.

Had there been no such disparity between the local value of the house and its intrinsic worth, or had the other market not

existed, the allotment of the house to the defendant would not have been disturbed. The allotment was set aside because of a cardinal principle regarding all such allotments—that an allotment must result in no inequity to the interests of the other co-tenants. "It would be inequitable," the court held, "to bestow this bargain upon one tenant at the expense of the other."[6]

There is no doubt that Marion Few would have gotten a bargain in the house, but in what sense would his bargain be at the expense of his co-tenant? What she had been deprived of in the allotment of the house at this valuation was the right to bring the property to a sale and obtain the bargain for herself or to realize more for the property by competitive bidding. The court could have cited with great effect the case of *Moore v. Williamson*.[7] The opinion in that case is as follows:

> It is equally a notorious practice in partition cases, that a party dissatisfied with the rate at which land is recommended to be assigned to another party, may shake the proposed assignment, and bring the property to a sale by making and securing a bid for a material advance in price over the value assessed by the Commissioners. The Court would not attend to an insignificant advance (since such a practice would tend to hang up causes indefinitely, without sensibly promoting the justice of cases), but wherever the advance is for the substantial benefit of all the parties interested in the partition, the Court is bound to attend to it.[8]

In the present case the court could have pointed out that the relief offered by the rule in the *Moore* case had been overlooked below and remanded the case to allow the plaintiff-appellant the opportunity to secure a bid for a higher figure. Considering the plaintiff's evident affluence and her claim that the property was undervalued by 40,000 dollars, there was no doubt that she was ready and willing to offer a "material advance in price." This is implicit in the appeal itself. In this circumstance omission of the intermediate step of the actual securing of a bid was warranted.

It may be argued that this case goes beyond the *Moore* case. If so, the modern rule would be that the court will order a sale instead of alloting an improvement at an assigned valuation

6. Few v. Few, 242 S.C. 433, 442, 131 S.E.2d 248, 252 (1963).
7. 10 Rich. Eq. 323 (S.C. 1858).
8. *Id.* at 328.

when (a) a substantial higher bid is obtained, or (b) there is a reasonable possibility that the property may realize more than its normal market value, or (c) the intrinsic worth of the property substantially exceeds its market value.

One could shrug away all technicalities and say that the property should be sold when it is inequitable to make an allotment at market value. When we ask what this statement means we return to the technical rules, although in equity there may always occur the rare case that falls outside them.

The second issue for decision was whether the lower court erred in directing that the property be divided in kind. The testimony on this point showed the same conflict as the testimony concerning the market value of the house. The local witnesses, regarding the land as ordinary farming land, saw no reason why it could not be divided in kind. The outside experts, regarding the handsome house and large acreage as an estate, believed that its value would be destroyed by subdivision into smaller tracts. It would seem that each group was correct within its frame of reference.

The decision of the referee and of the circuit judge that the land could be divided in kind presupposed that the house would be allotted separately to the defendant. They expressed no opinion as to the propriety of this division in case of a sale of the house at public auction. Much of the testimony on which the decision below was based assumed that the house would be allotted and not sold. The outside experts believed that a division of the property in kind would especially impair the market value of the house. The decision to auction the entire property was a consequence of the decision to auction the house and was technically not a reversal of the finding of the referee and circuit judge. The third issue in the case, a point of procedure, was decided without discussion.

The case emphasizes certain considerations which infrequently appear in partition suits at the appellate level, and the opinion had to adapt itself to the posture of the case on appeal. It appears, however, that the decision is in conformity with the established law regarding partition.

Must the grantee of a deed accept its delivery in order for title to pass? The case of *Branton v. Martin*[9] contains an important discussion of this question. Sarah A. Branton had six children:

9. 243 S.C. 90, 132 S.E.2d 285 (1963).

Sam, Essie, Leila, Alice, Maggie, and Laura. Mrs. Branton had conveyed a lot to Laura in 1933. In February 1946 her son, Sam, was visiting Mrs. Branton. In the presence of her daughter, Maggie, with whom she lived, Mrs. Branton gave a paper to Sam, saying, "Take care of it and keep it, it is for you children, and Maggie knows about it, you may need it some day."[10] Sam, without determining the contents of the document, gave it to his sister, Laura, for safekeeping. This paper, as it developed, was a deed bearing a date of January 8, 1946, conveying property to all of the children except Laura. In August 1946 Mrs. Branton made a deed of the same property to her daughter Maggie. The deed of Mrs. Branton to the children was recorded in 1958. That of Mrs. Branton to Maggie was recorded in 1951.

As presented on appeal the principal issue in the case was whether the first deed had been accepted by the grantees, who were ignorant of its contents at the time it was delivered and for a considerable period thereafter. The doctrine that a deed must be accepted in order to pass title is peculiar to American law. At common law and in English law acceptance is not required although the grantee has a right to disclaim or repudiate the deed. There has never been a South Carolina case where a deed was held to be invalid for want of acceptance by the grantee. The court indicates that it is prepared in a proper case to abandon explicitly the dogma requiring acceptance of a deed by its grantee. But this was unnecessary here in view of a generally recognized exception to the requirement of acceptance, which is that where there is a voluntary conveyance which is beneficial to the grantee the acceptance of the deed will be presumed even though the grantee is ignorant of the terms of the deed. A presumption of this nature is a tacit repudiation of the rule. It is doubtful that a case will ever arise in which the ghost of the doctrine of acceptance will be forever laid to rest. The comments of the court bring this case within a hair's breadth of doing so.

Also of interest in the present case is the proof of the execution of the deed made by Mrs. Branton to her children. Mrs. Branton could not write her name and her signature was evidenced by an "X" mark. One of the subscribing witnesses identified his signature on the deed, but had no recollection of the actual execution. The other subscribing witness denied that he had witnessed the deed and denied his signature. The notary who took

10. *Id.* at 95, 132 S.E.2d at 287.

the probate also denied his signature. The master concluded that the witness simply did not remember the transaction and found that the deed had been properly executed and witnessed. The circuit court concurred in this finding and the South Carolina Supreme Court upheld it against the argument that the conclusion below was against the greater weight of the evidence.

In upholding the conclusion, the decision makes reference to the case of *Hunt v. Smith*,[11] where one of the witnesses had died before the trial and the other witness was living, but was not produced. The husband of the grantor testified that the witnesses did not see his wife sign and that he had taken the deed to each of the witnesses and asked each of them to execute it. In the *Hunt* case the court found that the oath of the witness before the notary who took the probate gave rise to a presumption of the truth of the facts recited in the probate. The lower court was justified in finding that the testimony of the husband was not sufficient to overcome this presumption. In the *Hunt* case there was no doubt that the grantor of the deed had actually executed it. In the present case the grantor could not write her name and her signature was evidenced by an "X" mark. The notary himself testified that he had not signed the deed. The *Hunt* case is analogous in spirit, but only in spirit. In both cases the lower court found that the disputed deed had been properly executed and witnessed. It is not clear whether, had the lower court held otherwise, the criteria adopted in these two cases would have been used to overrule the finding below.

The case of *Southern Ry. Co. v. Smoak*[12] construes a deed given to the Southern Railway Company. The granting clause was "unto the Railway Company" and omitted the words "successors and assigns." The habendum of the deed was as follows:

> To have and to hold the said premises unto The Railway Company, its successors and assigns, as a right of way for use for railroad purposes so long as it or they may require the said right of way for the operation, maintenance and repair of said industrial spur track.
>
> Upon condition, however, that in the event that Railroad Company should abandon the said industrial spur track and in evidence thereof should discontinue the operation of the same and remove its property and fixtures therefrom and from the way appurtenant thereto, then and in such event

11. 202 S.C. 129, 24 S.E.2d 164 (1943).
12. 243 S.C. 331, 133 S.E.2d 806 (1963).

> the said parcel of land hereby conveyed shall revert to the parties of the first part, their successors and assigns.[13]

The rule at common law and that generally in force is that the words "successors and assigns" are not necessary to convey a fee simple to a corporation aggregate (as distinguished from a corporation sole). There has been no South Carolina case on this point, but the present case settles the question for all practical purposes.

It was the position of the railway that the granting clause placed in it a fee simple absolute title. Since the granting clause, as the plaintiff claimed, gave it a fee simple absolute, the estate so granted could not be cut down by subsequent language in the habendum, in accordance with the well known rule to this effect. This outrageously ingenious sophistry failed. Under the plaintiff's theory, how could one possibly grant a limited estate to a corporation? The rule that provides that words of succession are not necessary to give a corporation a fee simple title also provides that in the absence of such words the general intent of the deed may be considered in determining what estate was conveyed. The court assumes for the purpose of the decision that South Carolina recognizes the rule that words of succession are not necessary to place a fee simple absolute title in a corporation.

The court then held:

> Assuming, without deciding, that the stated rule applies in this State, the present deed falls within a recognized exception. This exception is set forth in Restatement of the Law of Property, Section 34, page 96, as follows:
>
> > An estate in fee simple absolute is created in a corporation aggregate by an otherwise effective conveyance inter vivos of land without the use of words of succession, *unless an intent is expressed in the conveyance to create an estate other than an estate in fee simple absolute.* (Emphasis added.)
>
> The foregoing exception, applicable here, may be stated to be that the omission of words of succession from the granting clause in a deed to a corporation aggregate is indicative of an intent to convey an estate less than a fee simple absolute, when the habendum shows a clear intent to convey a lesser estate. This does not state a novel rule of construction,

13. *Id.* at 334-335, 133 S.E.2d at 808.

but is simply the application to the present deed of long settled principles of law.[14]

This decision is obviously right. Although the case does not hold that South Carolina recognizes the rule that words of succession are not necessary to give a corporation a fee simple title, there can remain little doubt that this doctrine will be accepted by the court.

In the case of the *Peoples Nat'l Bank v. Hable*[15] a testator had created a life estate in trust for the benefit of an invalid daughter. The remainder was given to the testator's wife and another daughter, or to the survivor of the two. Unexpectedly both of the remaindermen predeceased the life tenant. The problem faced by the court was what happened to the remainder. The terms of the will of Hyman Endel which gave rise to this controversy, are as follows:

> 12TH: The remaining one-fourth (¼) of the residue of my estate I will, bequeath and devise unto my wife Frances Endel and my daughter, Hortense Reisenfeld, in trust for the following purposes to invest said portion of my estate in income bearing securities and to pay over the income arising therefrom to my daughter Bernice Endel during the period of her natural lifetime and at her death then to divide said share of said residue equally between my said wife and my said daughter Hortense; in the event that either should die before said time for the division of said portion of the residue of my estate, then I give, bequeath and devise the share of such deceased one to the survivor of the two. In order to provide the income for my daughter Bernice I hereby give to the said trustees full power and authority to sell the said securities or any part thereof from time to time as they may think best and to reinvest the proceeds thereof in other income bearing securities, giving also full power to make resales of such securities as often as may be and whenever necessary for the same purpose.
>
> 13TH: For the purpose of making division of the residue of my property as hereinabove provided, I direct my Executors to have all my property, both real and personal, appraised by three disinterested persons, and that the beneficiaries of said residue shall have the right by agreement

14. Id. at 335-336, 133 S.E.2d at 808.
15. 243 S.C. 502, 134 S.E.2d 763 (1964).

to divide said property and securities among themselves in the proportions hereinabove set forth and if said beneficiaries are unable to agree upon such division, I direct my Executrices to sell said property including real estate and such securities, and to divide the proceeds as hereinabove set forth; after the death of my daughter Bernice, I desire the division of the property devised and bequeathed in trust for her to be made in the same way, Mrs. Endel and Hortense sharing equally therein, and if only one survive she to take the entire interest.[16]

Frances Endel, the widow, died in 1937 and Hortense Reisenfeld, the other remainderman, died in 1958. Bernice Endel survived both and died in 1959. Frances Endel was the testator's third wife and there were no children of that marriage. Hortense and Bernice were the children of a second marriage and the only children of the testator. Hortense had devised her property to an unrelated individual. As a result there were three distinct groups of claimants. The principal contentions of the various parties as set forth in the agreed statement in the transcript were as follows:

(1) The remainder was contingent, the vesting of same being conditioned on the remaindermen surviving the life tenant.

(2) The remainder was vested subject to divestment upon the failure of either remainderman to survive the life tenant.

(3) The remainder was vested jointly, each one-half interest being subject to divestment by executory devise upon the death of either remainderman prior to the termination of the life estate and in favor of the survivor of the two remaindermen, said survivor not having to survive the life tenant in order to take the entire remainder interest absolutely.

(4) The remainder was vested, each one-half interest being subject to divestment by executory devise upon the death of either remainderman prior to the termination of the life estate, but only if the surviving remainderman also survived the life tenant.

The distinction between contention 2 and contentions 3 and 4 may not be readily apparent. This distinction arises from the

16. *Id.* at 507-508, 134 S.E.2d at 765.

attempt to invoke the case of *Blount v. Walker*[17] which will be discussed below.

The master held that the remainder interest devised to the testator's wife and to his daughter, Hortense, did not become vested at the death of the testator but was contingent upon the remaindermen surviving the life tenant. He thus concluded that the trust property should go as intestate property to the testator's heirs at law determined at the time of his death. The circuit court reversed the master. The order of Judge McFadden held that upon the death of the testator, his wife, Frances, and daughter, Hortense, "took a vested remainder in the one-fourth residue of his estate, subject to alternative divestment between them; 'in the event that either should die before said time for the division of said portion of the residue of my estate' leaving 'either' (one or the other) as 'the survivor of the two,' if such event occurred, only then, 'if only one survived, she to take the entire interest.' "[18]

The theory of the circuit court, therefore, was that Frances and Hortense were each the owner of a vested one-half interest in remainder. If either (not both) of them died before Bernice leaving the other surviving at the time of the distribution, then the living remainderman was to take all. Since both died before Bernice the gift over did not take effect, and the property was left as an indefeasibly vested interest in each remainderman. Consequently those claiming through Frances and those claiming through Hortense each were entitled to a one-half interest in the trust property.

The position of the master embraced "contention 1" and that of the circuit judge embraced "contention 4." The South Carolina Supreme Court adopted "contention 3," and held that once Hortense had survived Frances the remainder was irrevocably vested in her, so that her devisee took the whole trust property. The contention that the remainder was contingent was argued with great ability and effect by two distinguished firms of attorneys. Nonetheless, it seems obvious that the remainder interests were not contingent, but were vested remainders subject to divestment.

The considerations which apply to cases like these have been discussed time and again. The provision that if either of the remaindermen predeceased the life tenant the share of the de-

17. 31 S.C. 13, 6 S.E. 558 (1888).

18. Peoples Nat'l Bank v. Hable, 243 S.C. 502, 508, 134 S.E.2d 763, 765 (1964).

ceased one should go to the survivor of the two is a type of gift which is universally construed as an executory devise. The condition on which the gift is made is called a condition subsequent, to distinguish it from a condition precedent which would give rise to a contingent remainder. Gifts made in this form are common. They are to be distinguished from gifts to named remaindermen "then surviving" or similar words which explicitly require that remaindermen be living at the death of the life tenant in order to take any interest at all. The fact that there is a gift over under certain conditions to the survivor of the two remaindermen creates no legal implication that the remainder was contingent in the first instance. The words of survivorship are used only in reference to the gift over, not in reference to the original gift in remainder. Even though we may reasonably assume that in his own mind the testator did not anticipate that both remaindermen would die before the life tenant, this does not affect the vested character of the remainder. The objective meaning of the words he used and the legal intent of his will was to vest the remainder at the time of his death, without the requirement that the remaindermen survive the life tenant in order to take. The court disposed of the contention that the remainders were contingent by reference to the usual authorities, which will not be repeated here.

What may be confusing to an attorney unaccustomed to this field of practice is what happens when there is a gift over to a survivor and there is no survivor to receive the gift. The answer is very simple. Nothing happens. If there is no survivor, the gift over does not take place. The absolute estate first given can be defeated only where the limitation over can take effect.[19] When the Endel will is considered in this light, it is apparent that the remainder was vested either in Hortense or jointly in Hortense and in Frances. The choice between these alternatives must be based upon the determination of the intention of the testator as expressed in this particular will.

The South Carolina Supreme Court refers to a series of cases in which similar testamentary provisions have been construed as requiring survivorship only of the other remainderman under factual circumstances resembling those in the present case. To this list should be added the case of *In re Moore's Estate*.[20] It is the holding of all of the cases that the phrase "survivors of

19. Perry v. Logan, 5 Rich. Eq. 202 (S.C. 1853).
20. 147 Neb. 134, 123 N.W.2d 685 (1946).

them" or "survivor of the two," referring to survivorship between remaindermen, does not give rise to the implication that the survivor of the remaindermen must also be surviving at the termination of the life estate. But if there are other words in the will which do express such a requirement, they will be duly considered and the limitation over will then be given effect only if the survivor is living at the termination of the life estate. There are cases similar to the one at hand where such an intent was found to exist.[21]

Kersh v. Yongue involved a deed which contained the following language:

> [T]hat at and after the death of my said daughter, the said (trustee) shall convey, release and confirm unto the four present children of my said daughter, or the survivor or survivors of them, in equal shares, as tenants in common, the absolute right and title in and to all the above mentioned property, both real and personal, together with the increase thereof, and to their heirs forever.[22]

All four children died before the life tenant, and the issue in the case was whether the property reverted to the estate of the grantor or whether it was vested, and thus transmissible to the children's distributees. In holding that the remainder was vested and transmissible to the children's distributees the court also held that the remainder was held in equal shares by the estates of the four deceased children.

The words of the Kersh deed, "unto the four present children of my said daughter, or to the survivor or survivors of them,"[23] are superficially similar to the words in the Endel will "to the survivor of the two."[24] In the Kersh deed, however, it is obvious that the time referred to is the death of the life tenant, and that what is required is survival of the life tenant and not of some other remainderman. In the Endel will the language in Item 12 contemplates only the survival of one remainderman by the other remainderman, for the language reads "in the event that

21. Kersh v. Yongue, 7 Rich. Eq. 100 (S.C. 1854); Belk v. Slack, 1 Keen 238, 48 Eng. Rep. 297 (1836); Browne v. Lord Kenyon, 3 Madd. 410, 56 Eng. Rep. 556 (1818); Harrison v. Foreman, 5 Vesey Jr. 207, 31 Eng. Rep. 549 (1800); *In re* Pickworth's Estate, 1 Ch. 642 (1899).

22. Kersh v. Yongue, 7 Rich. Eq. 100 (S.C. 1854).

23. *Ibid.*

24. Peoples Nat'l Bank v. Hable, 243 S.C. 502, 134 S.E.2d 763 (1964). 763 (1964).

either should die before said time for the division of said portion of the residue of my estate."[25]

The circuit court regarded the provision in Item 13 of the will, which stated "After the death of my daughter, Bernice, I desire the division of the property devised and bequeathed in trust for her to be made in the same way, Mrs. Endel and Hortense sharing equally therein, and if only one survives then she to take the entire interest,"[26] as constituting a clear expression by the testator of an additional intent to require the survivor to be living at the date of the death of the life tenant in order to receive the gift over of the other one-half remainder interest. This language enlarged and explained the intention expressed in Item 12. The South Carolina Supreme Court, however, dismissed this language as surplusage and found that Item 13 was not intended to be dispositive. This being the case there was nothing in Item 12 which would give rise to the requirement that for the gift over to take effect the survivor must be living at the death of the life tenant. The court therefore held that Hortense, who was the survivor of the two remaindermen, was indefeasibly vested with the entire remainder.

The writer represented those who claimed the interest of Frances Endel. It was my contention that the will should be construed as a whole and that the provisions of Item 13, quoted above, demonstrated that the testator intended that the survivor, in order to take, must be living at the death of the life tenant. The construction of a will of this type is a matter of delicate judgment, and the decision of the court is not demonstrably in error. The writer assumes that it is the bias resulting from his long advocacy of the other position that leads him to feel that the manner in which the South Carolina Supreme Court dismissed the language in Item 13 was rather cavalier.

The position described as "contention 2" was an attempt to argue that there was a defeasance as to the interest of both remaindermen in favor of the testator's heirs determined as of the date of the death of the life tenant, Bernice (the date of the termination of the trust). This proposition appears ridiculous on its face, but had a more plausible basis than might be expected. There is a curious case, *Blount v. Walker*,[27] where upon the failure of all contingent remainders in a testamentary trust the

25. *Id.* at 507, 134 S.E.2d at 765.
26. *Ibid.*
27. 31 S.C. 13, 6 S.E. 558 (1888).

reversion was held to go to the heirs at law of the testator determined as of the termination of the trust. It is doubtful that *Blount v. Walker* would be followed at the present time even in a case resembling it more closely than did this one, and the court chose to ignore it in the present opinion.

In the case of *Connor v. Farmers & Merchants Bank*,[28] the plaintiff, an elderly woman, rented an apartment. The landlord undertook to repair a brick floor on the premises, and due to the use of defective mortar in these repairs crevices developed between the bricks. The plaintiff, momentarily distracted by the escape of her pet parakeet, caught the heel of her shoe in one of these cracks and fell, sustaining serious injuries. It was alleged and proven to the satisfaction of the jury that the landlord had been negligent in the manner in which the brick floor was repaired.

The decision noted that in the absence of contract a landlord is under no duty to make repairs, while if a contract to repair exists the liability of a landlord for the failure to make repairs is limited to an action for breach of a contract. However, where the landlord actually undertakes to make repairs and does so in a negligent fashion he may be held liable in tort for injuries resulting from his negligence. The decision holds: "Negligence on the part of the lessor in making repairs or improvements is regarded as an act of misfeasance, subjecting him to tort liability for any resulting damages."[29]

The homestead exemption is not a shield against obligations contracted for the erection or making of improvements or repairs on the homestead itself.[30] The case of *Brookline Sav. & Trust Co. v. Barnett*[31] involves this gap in the homestead exemption. The Barnetts entered into a contract with American Veneering Company for new siding on their house. They executed a note for these improvements. The note contemplated assignment to Brookline Savings and Trust Company, a Pennsylvania company, and it was so assigned. To effect adjustments in payments the Barnetts executed two subsequent notes to Brookline which were designated as "revision notes," and which said in clear language that the holder's original rights were to remain unimpaired. Upon default in payment Brookline obtained a judgment in

28. 243 S.C. 132, 132 S.E.2d 385 (1963).
29. *Id.* at 139-140, 132 S.E.2d at 388.
30. S.C. Code Ann. § 34-62 (1962).
31. 243 S.C. 481, 134 S.E.2d 569 (1964).

Pennsylvania against the Barnetts under a provision in the notes which gave it the right to do so. Suit was then brought upon this judgment in York County.

Section 34-62 of the Code[32] provides that prior to levy upon a homestead under the statute a certification by the court must be obtained that the origin of the judgment was for one of the purposes which are stated to be superior to the homestead. The suit therefore asked that the court declare the Pennsylvania judgment to be a judgment in South Carolina, and that the court certify that the judgment was a lien upon that realty of the debtors which they claimed as a homestead.

It was the position of the defendants that the judgment was not for an obligation contracted for making of improvements or repairs upon the homestead, but was merely a judgment upon a promissory note held by one who furnished no materials or labor for such improvements, and moreover that a judgment on a renewal note could not be enforced against the homestead.

The court based its decision upon the general law of homestead as contained in *Corpus Juris Secundum* and cases cited therein. Obligations for purchase money or for improvements on the homestead may be freely assigned, without losing their special character. Likewise the character of such an obligation is not changed by a renewal note, even though it may be for a different amount or a different rate of interest from the original obligation. Brookline was therefore entitled to levy against the homestead.

The court cites as South Carolina authority *All v. Goodson*[33] where an improvement on the homestead was furnished by a company through a commissioned agent. The debtor paid the company its part and gave the agent a note for his commission. The agent was allowed to collect the note against the homestead on the grounds that it represented part of the cost of improvement on the homestead. The court considers the agent's note in the *All* case as constituting, in effect, an assignment of part of the debt by the company to the agent. On this basis the court regarded the question of the assignment of such an obligation as already settled in South Carolina. It might be mentioned that there is another case, *White v. Barberry*,[34] involving levy against

32. S.C. CODE ANN. § 34-62 (1962).
33. 33 S.C. 229, 11 S.E. 703 (1900).
34. 103 S.C. 223, 88 S.E. 132 (1915).

homestead under section 34-62.1 of the Code[35] which appears also to be good precedent. This section of the code provides that advances for materials used in farming on the homestead shall be collectible from crops produced on the homestead. A landlord endorsed his tenant's fertilizer note, and in due time was required to pay it. He took an assignment of the note, and as assignee he sued the tenant. It was held that the landlord was entitled to recover on the note against the tenant's homestead as one making agricultural advances. (The crops themselves had been set off as homestead, although the land was rented—not homestead land. The effect of the assignment was the question in the case.)

Real Property Cases Decided on Facts

Allen v. Grimsley[36] is an action for breach of a general warranty in a deed. The issue in the case was a factual one—whether a real estate agent, who had accepted the down payment on property and failed to apply it to the satisfaction of the mortgage, was the seller's agent or the purchaser's agent. There is nothing in the case of interest beyond the factual issues involved.

In the case of *Burrell v. Kirkland*[37] the plaintiff's right to use a "field road" crossing property of the defendants was at issue. The *per curiam* opinion adopts the decree of the circuit judge. The decree presents the case in a clear and logical fashion, and presents good citations on each of the points involved. The case itself was decided on the facts and the opinion contains nothing of note.

The case of *Dargan v. Metropolitan Properties, Inc.*[38] was an appeal from a foreclosure action. The mortgagor had attempted to show that it would be inequitable to allow the mortgagee to accelerate the balance due under a note and to bring foreclosure. The court held that the mortgagor had failed to prove sufficient facts to warrant equitable interference with the mortgagee's right to foreclose the mortgage. The case contains no reference of note to any legal principles.

The cases of *Hall v. Senn*[39] and *Allen v. Georgia Industrial Realty Co.*[40] were both won in the lower court on defenses of

35. S.C. Code Ann. § 34-62.1 (1962).
36. 243 S.C. 398, 134 S.E.2d 211 (1964).
37. 242 S.C. 201, 130 S.E.2d 470 (1963).
38. 243 S.C. 324, 133 S.E.2d 821 (1963).
39. 242 S.C. 544, 131 S.E.2d 700 (1963).
40. 242 S.C. 472, 131 S.E.2d 419 (1963).

estoppel and laches. The briefs in both appeals attempted to raise interesting questions as to the applicability of these defenses, but in each case the court rather saw fit to affirm on the grounds of the appellant's procedural ineptitudes. Although in the *Hall* case the court reviewed the testimony, the decision does not seriously consider the points made in the appellant's brief and rests on the failure of the crucial exception to contain any specification of error. In the *Allen* case the statement of questions involved in the appellant's brief failed to put in issue the defense of estoppel, although proper exception had been taken and the matter was argued in the brief.

The cases should serve as a warning to those whose positions are strong on law but weak on equity. There is no one whose rights are held in less regard by an appellate court than the litigant who has lost his case by laches or estoppel. The mercy shown by equity goes only to the winner; the loser, at the expense of whose legal rights equity has done its justice, is made to seem contemptible.

Zoning and Permit Cases

In the case of *Bob Jones Univ. v. City of Greenville*[41] one hears but the echo of a controversy which was vigorously and stridently waged in court and elsewhere.

The city of Greenville zoned for business a residential buffer strip which had heretofore existed between Bob Jones University and commercial properties. Both the master in equity and the circuit judge concluded that the evidence failed to show that the re-zoning was arbitrary, unreasonable or an abuse of discretion on the part of city council. When the South Carolina Supreme Court accepted these concurrent findings it disposed of most of the issues of the case. The university raised the issue of spot zoning. Since the effect of the amendment of the ordinance was to expand an existing zone this contention was rejected.

A more serious question, and one which evoked a well written dissent, related to the failure of the master to rule on objections to testimony and to contain in his report a statement of precisely what testimony he had considered in arriving at his findings. The master had failed to follow the procedure described in section 10-1409 of the Code[42] during the hearing, and in his report did nothing to correct this error. It has not been the custom of

41. 243 S.C. 351, 133 S.E.2d 843 (1963).
42. S.C. CODE ANN. § 10-1409 (1962).

SOUTH CAROLINA LAW REVIEW, Vol. 17, Iss. 1 [2020]

the master in Greenville County to follow this code section. In the normal case this practice creates no great hardship upon those attorneys which may wish to appeal, but in a case involving voluminous testimony and exhibits and numerous objections it becomes impossible to determine to what extent the master's conclusions may be based upon inadmissible testimony. While the court found that the master's failure to observe the statutory mandate was not prejudicial to the appellant, one cannot help but notice that the appellant did, after all, lose the case on the facts found by the master, by whatever testimony these may have been established.

Lominick v. City of Aiken[43] involves a fickle building permit. Under the zoning ordinance of the city of Aiken property located in a "P" zone may be used for professional offices and for "businesses which are incidental to the above professional practice, e.g., prescription shops, optical sales, etc."[44] Robert Lominick, a pharmacist, was interested in buying a lot in this zone for the purpose of building and operating a drug store. He and his attorney were concerned whether his business would be allowed under this ordinance. Before acquiring the property Lominick and his attorney had numerous conversations with the mayor, city manager, and city attorney; and they submitted to the city manager a formal request for a ruling. This request contained a description of Lominick's proposed drug business in the following langauge: "The primary business of the proposed structure will be the selling and dispensing of prescription drugs and hospital supplies. A small soda fountain sufficient in size to accommodate ten (10) stools, will be located in the building. It is contemplated that tobacco, magazines, and small gifts will be sold."[45] The city attorney gave an opinion in writing to the city manager to the effect that the proposed building and business were proper under the ordinance and that a building permit should be issued. Lominick then bought the lot on the strength of this understanding, and applied to the building inspector for a permit. The permit was duly issued. After the permit was issued neighbors owning residences adjoining the property complained to city council, which then, on a mere motion, voted to revoke the permit. Lominick brought suit against the city of Aiken and the neighbors to adjudicate his rights in the matter.

43. 244 S.C. 32, 135 S.E.2d 305 (1964).
44. *Id.* at 35, 135 S.E.2d at 306.
45. *Id.* at 36, 135 S.E.2d at 306.

The zoning ordinance stated that any appeal from the issuance of a building permit must be taken to the zoning board of adjustments, with further appeal to the court of common pleas. Neither the neighbors nor the city had pursued this remedy and therefore they now had no standing to challenge the building permit. The motion passed by city council was a mere resolution which could not amend or repeal the municipal zoning ordinance under which the permit had been granted. The proper course for the city was to have appealed the decision of the building inspector to grant a building permit to the zoning board of adjustments. The case therefore presents the amusing spectacle of a city which has lost in court because it failed to utilize and exhaust its own administrative remedies. This case is reminiscent of *Willis v. Town of Woodruff*[46] where a building permit was also improperly revoked as a consequence of the complaints of neighboring property owners.

Eminent Domain Cases

The case of *Sease v. City of Spartanburg*[47] arose on demurrer. The city of Spartanburg, the complaint alleged, was about to take certain property from the plaintiff as a right of way for a street, and as the street had been laid out, ingress and egress to the plaintiff's remaining property through it would be denied. The plaintiff alleged that the proposal of the city as to this street was fantastic, unreasonable, unnecessary, uncalled for and unwarranted. The legislature has delegated to municipalities the power to determine when the exercise of eminent domain is necessary. A determination by a municipality that it should exercise the power of eminent domain "is conclusive and is not subject to judicial review in the absence of fraud, bad faith, and clear abuse of discretion."[48] The allegations that the proposal to construct a street in the manner contemplated by the city was fantastic, etc., were merely conclusions of the pleader and as such were not admitted by the demurrer. The actual facts set forth in the complaint were not sufficient to allege fraud, bad faith, or clear abuse of discretion on the part of the city. The demurrer was sustained. The court noted that deprivation of egress and ingress would constitute a special injury to the plaintiff, and that if this occurred the plaintiff would be entitled to special dam-

46. 200 S.C. 266, 20 S.E.2d 699 (1940).
47. 242 S.C. 520, 131 S.E.2d 683 (1963)
48. *Id.* at 525, 131 S.E.2d at 686.

ages. Therefore the plaintiff would have an adequate remedy at law and would not on this ground be entitled to the injunctive relief which she sought in her complaint.

The case of *Tuomey Hosp. v. City of Sumter*[49] involves the question of whether the city of Sumter could condemn for street purposes a portion of the land owned by a charitable hospital. Property already devoted to a public use cannot be taken for some other public use in the absence of an appropriate expression of legislative intent. Where the state itself is exercising the power of eminent domain, this legislative intent may readily be inferred. For example, power granted to the state highway department to condemn for highway purposes implies that it may take property devoted to other public use.[50] But in the case of condemnation proceedings brought by municipalities, counties, or public service corporations the general right to condemn does not give rise to the implication that property devoted to some other public use may be taken. Moreover, section 47-68.1 of the Code,[51] which grants to municipalities the right of condemnation, expressly states, "this section shall not apply to any property owned by public service corporations or devoted to public use."

In the case of *County Bd. of Comm'rs of Clarendon County v. Holliday*[52] the trustees of a church cemetery successfully resisted condemnation by the county of a strip of land for road purposes. The strip did not include any graves but appears to have been a parking area.

On the other hand, in the case of *Twin City Power Co. v. Savannah River Elec. Co.*,[53] one power company was allowed to condemn the land of another. In this case the Savannah River Electric Company had been given the right to develop an area along the river for production of power and had acquired land for this purpose, but had sat on the property for a long time without developing it. Twin City Power Company was given a franchise to build a dam for power in the same area. The court held that the grant of a franchise to the second company would have been a futile act if this company could not condemn the property already held in the same area by the first company and found an expression of legislative intent allowing this con-

49. 243 S.C. 544, 134 S.E.2d 744 (1964).
50. Riley v. South Carolina Highway Dep't, 238 S.C. 19, 118 S.E.2d 109 (1963).
51. S.C. CODE ANN. § 47-68.1 (1962).
52. 182 S.C. 510, 189 S.E. 185 (1937).
53. 163 S.C. 438, 161 S.E. 750 (1929).

demnation. This decision was also based on the second ground that property condemned or purchased for a public use but never put to that use, is as freely subject to condemnation as property of a private individual.

In the instant case the city of Sumter was certainly in no position to claim that its authority to condemn property devoted to other public use had been given by the legislature by express terms or other necessary implication, such position being made wholly untenable by the express terms of the statute referred to above. This left the issue of whether the hospital property is in fact devoted to a public use. The complaint alleged that the hospital was an eleemosynary corporation operating a charitable hospital under the provisions of the will of the late T. J. Tuomey and that the property owned by the hospital is devoted to a public use. The case was heard on a demurrer. The court pointed out that the statement in the complaint that the property owned by the hospital is devoted to a public use is an inference drawn by the pleader from the facts or a conclusion of law and as such was not admitted by the demurrer. The court remarked that the question of whether the complaint alleged the public use of the property is "a close one," but overruled the demurrer. Since the court states that the mere allegation that the property is held by an eleemosynary corporation and is devoted to charitable purposes does not in itself show that the property is devoted to a public use within the meaning of condemnation law, and since the court holds that the statement in the complaint that the property "is devoted to a public use" is an inference drawn by the pleader or a conclusion of law, it is difficult to point to anything in the decision which justified overruling the demurrer. In this connection note the *Sease* case, *supra.* It would have been desirable for the complaint to have set out the factual elements of public use, and anyone who may bring such a complaint in the future would be well advised to do this.

The definitions of public use given by the court emphasize that such use cannot be merely permissive, but that the public must have a right in the property, independent of the owner's pleasure. Do not leap to the conclusion that the definitions given require that any member of the public at large may insist upon the right to use the property. After all, a church cemetery is a "public use," as is the right of way of a power company though the company is "not compelled or intending to furnish current

to scattered customers . . . unless it would be remunerative."[54]

The case of *Willimon v. City of Greenville*[55] is another illustration of the relative disability suffered by municipalities in condemnation cases. In the *Tuomey* case it was seen that the limitation of the power of eminent domain granted to municipalities prohibits their condemnation of property held for public use. In the *Willimon* case attention is called to the fact that the liabilities of municipalities for damages are greater than those of the state. Under section 47-1327 of the Code[56] it has been held that a city is liable to the landowner for damages caused to property by alteration or change in grade of abutting streets, although a change of grade is not "a taking" of property under the constitution. A municipality is therefore liable to an abutting property owner for damages resulting from a change of grade, but the highway department is not liable. Cases on these points are cited by the court in its opinion. Before 1951 municipalities were responsible for state highways within city limits. Under the Act of 1951[57] the State Highway Department was authorized to give its attention to state highways within municipal limits, provided that all work performed by the highway department on such highways would be with the consent and approval of proper municipal authorities.[58]

Under section 33-173 of the Code[59] approval by the municipality of work undertaken by the highway department "should be understood to mean that the municipality thereby assumes all liability which the department might otherwise have, etc."[60] In the present case the grade of a state highway lying within the Greenville city limits was altered in such a manner as to injure the value of certain abutting property which was being used as a filling station. The landowner made demand upon the city to appoint appraisers in condemnation, but the city refused to do so on the grounds that it had no liability for damages resulting from the change of grade. The landowner then brought this proceeding for mandamus to compel the city to appoint the appraisers.

54. Bookhart v. Electric Power Co-op., 219 S.C. 414, 65 S.E.2d 781 (1951).
55. 243 S.C. 82, 132 S.E.2d 169 (1963).
56. S.C. CODE ANN. § 47-1327 (1962).
57. S.C. CODE ANN. § 33-112 (1962).
58. S.C. CODE ANN. § 33-172 (1962).
59. S.C. CODE ANN. § 33-173 (1962).
60. S.C. CODE ANN. § 53-123 (1962).

The position of the city was that it had assumed only the liability of the highway department, under section 33-173 of the Code.[61] Since a change of grade is not "a taking" under the constitution, the highway department had no liability for the resulting damages. The landowner contended that section 33-173 and other language in the 1951 Act merely fixed the liability of the municipality and the highway department *inter sese* and did not relieve the municipality from the consequences of section 47-1327 of the Code.[62] The landowner contended that section 47-1327 still governed state highways within municipalities so far as the rights of abutting property owners were concerned.

The South Carolina Supreme Court found for the landowner, holding:

> [W]e are of opinion that where a City authorizes and approves an improvement, construction, reconstruction or alteration by the Highway Department of a State Highway within such municipality in addition to assuming all liability which the Highway Department might otherwise have as a result of such action under Section 33-173, Code of Laws of South Carolina, 1962, the City will also be liable for such damages arising therefrom as though it had performed the work itself; . . .[63]

The case of *Jones v. Jones*[64] was an action brought by a husband against a wife and against the South Carolina State Hospital. The complaint alleged that the defendants had wrongfully conspired to incarcerate the plaintiff in the South Carolina State Hospital and had subjected him to shock treatments and confinement against his will.

The state hospital demurred on the grounds that as an agency of the state it was immune from suit. The demurrer was allowed. The plaintiff-appellant contended that since the constitution provides for the payment of just compensation upon the taking of private property for public use, and since his liberty and right to work were a species of property, he was entitled to compensation for their taking. Whatever was taken from the plaintiff, the taking was not for public use. The constitution provides for the payment of just compensation only when the taking is for

61. S.C. CODE ANN. § 33-173 (1962).
62. S.C. CODE ANN. § 47-1327 (1962).
63. Willimon v. City of Greenville, 243 S.C. 82, 89, 132 S.E.2d 169, 172 (1963).
64. 243 S.C. 600, 135 S.E.2d 233 (1964).

public use, and if the taking is not for public use it is then a mere tort. As to torts the state may assert its immunity from suit.

The case of *South Carolina Highway Dep't v. Bolt*[65] contains a lucid discussion of certain elements of damage in condemnation cases. The property of the landowner was used by him for the operation of a successful chicken farm. A portion of this property was taken for a non-access highway. The landowner showed that the noise from the traffic would adversely affect the productivity of the chickens and that the location of some of the chicken houses had become unsuitable. The landowner requested that the court instruct the jury that his loss of business was an independent element of damage which should be included in the just compensation due him.

The lower court correctly refused to charge the jury as requested. The damages recoverable in a condemnation case are limited to the value of the land actually taken and to any injury resulting to the remaining property. Loss of business arising from the taking is not a separate element of damage in the absence of a statute expressly allowing such damages. Injury to the business use of the property may properly be considered in determining the market value of the property before and after the taking. Property which can be used in a successful commercial enterprise is ordinarily more valuable than property which cannot be so used. Therefore the landowner's loss of business could be considered in determining whether or not the market value of the remaining property had been affected by the taking, but the loss of business itself could not be considered as a separate element of damage. While the landowner was entitled to introduce evidence as to the market value of the buildings which the condemnation had rendered unusable, he was correctly refused the right to introduce testimony as to the cost of building new chicken houses at another location.

Under section 33-217 of the Code[66] it is provided that abutting property owners along new non-access highways shall not be entitled to treat the denial of the right of access as grounds for special damages. In the present case the court points out that there are legitimate elements of damage arising from the presence of a non-access highway other than the mere denial of access to the highway. The statutory restriction as to damages in this instance does not cover the possible depreciation of the remain-

65. 242 S.C. 411, 131 S.E.2d 264 (1963).
66. S.C. CODE ANN. § 33-217 (1962).

ing property by reason of the non-access character of the highway. Where a non-access highway divides a tract of land into two portions, the fact that there is no access from one portion to the other may be considered in computing severance damages.

The case of *South Carolina Highway Dep't v. Schrimpf*[67] holds that a landowner is not entitled to interest on a condemnation award from the date of the verdict to the date of payment. There is a dissent written by Mr. Justice Bussey, joined by Mr. Justice Brailsford. This case involves detailed consideration of the construction of certain statutes regarding the entry of judgment. The dissent makes the less technical point that interest on a deferred payment should be a part of the "just compensation" required by the constitution. The considerations upon which the majority opinion was based are remote from the law of property and are therefore not discussed in this note.

In the case of *South Carolina Highway Dep't v. Sharpe*[68] the attorney for the landowner in his opening argument to the jury said, "You should be fair to the landowner, to the state government, and to the federal government."[69] Counsel for the highway department objected to the reference to the federal government and counsel for the landowner then explained "It is common knowledge that the federal government pays nine-tenths of the verdict in these cases."[70] Counsel for the highway department moved for a mistrial on the grounds that the remarks of the landowner's counsel were prejudicial. It may be assumed that the highway department was seeking a test case, since the quoted remarks appear to have been well intended. In *Johnson v. South Carolina Highway Dep't*[71] evidence in a condemnation case that the federal government was contributing to the cost of a highway project was held to be inadmissible. It was inadmissible because it had nothing to do with the issues. In the instant case the court stated that "the *Johnson* case is authority for the proposition that the argument or statements of counsel . . . were improper."[72] However, the court went on to find that while these remarks were improper they were not as a matter of law prejudicial. The court refers to the recent Georgia case of *State High-*

67. 242 S.C. 357, 131 S.E.2d 44 (1963).
68. 242 S.C. 397, 131 S.E.2d 217 (1963).
69. *Id.* at 399, 131 S.E.2d at 258.
70. *Id.* at 399, 131 S.E.2d at 259.
71. 236 S.C. 424, 114 S.E.2d 591 (1960).
72. South Carolina Highway Dep't v. Sharpe, 242 S.C. 397, 401, 131 S.E.2d 257, 259 (1963).

way Dep't v. J. A. Worley & Co.,[73] which held that disclosure of federal participation in a highway project in a condemnation case was not prejudicial. Despite the fact that mention of federal funds in a condemnation case is not prejudicial as a matter of law, and was found not to be prejudicial in the instant case, the court unequivocally prohibits the bar from mentioning it in argument. Reference to federal highway aid, the court stated, "should be scrupulously avoided because it is quite possible for such to be injected in such a manner as to constitute prejudice and require the granting of a mistrial or a new trial."[74]

The case of *Woodfields, Inc. v. Gantt Water & Sewer Dist.*[75] is a continuation of the litigation of *Derby Hgt's, Inc. v. Gantt Water & Sewer Dist.*[76] This former case is of importance in the law of eminent domain, but the present case was decided merely on issues of fact, and the concurrent findings of the master and the circuit judge were sustained by the supreme court.

Personal Property Cases

In *Layton v. Flowers*[77] the court was asked to reconsider the decision in *Tate v. Brazier*[78] which holds that the defense of bona fide purchaser for value without notice is not good against an automobile collision lien under section 45-551 of the Code.[79] Since the *Tate* case was decided some forty years ago and since the legislature has not seen fit to amend the attachment statute to protect bona fide purchasers for value without notice, the court regarded itself bound by the doctrine of stare decisis and declined to reconsider the earlier decision. The automobile which was attached in this case had been repaired after it had left the hands of the tort-feasant owner. Immediately after the accident the automobile was worth 350 dollars. The owner of the automobile at the time of suit had bought it for 970 dollars. The collision attachment lien was allowed only as to the value of the car at the time of the wreck, the court holding:

73. 103 Ga. App. 25, 118 S.E.2d 298 (1961).
74. South Carolina Highway Dep't v. Sharpe, 242 S.C. 397, 402, 131 S.E.2d 257, 260 (1963).
75. 243 S.C. 492, 134 S.E.2d 749 (1964).
76. 237 S.C. 144, 116 S.E.2d 13 (1960).
77. 243 S.C. 421, 134 S.E.2d 247 (1964).
78. 115 S.C. 283, 105 S.E. 413 (1920).
79. S.C. Code Ann. § 45-551 (1962).

To allow respondent the benefit of the enhanced value would reward him for his delay at the expense of an innocent person. We find no impelling reason why this windfall must be awarded respondent and hold that under the peculiar facts of this case respondent's lien may be enforced against the Chevrolet automobile in question only to the extent of $350.00.[80]

80. Layton v. Flowers, 243 S.C. 421, 425, 134 S.E.2d 247, 248 (1964).