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Terms of Annexations

In the case of *Bellamy v. Johnson*[1] the Supreme Court voided an annexation proceeding by which the Town of Ocean Drive Beach in Horry County sought to enlarge its corporate limits, on the ground that the ballot used in the election contained a misleading statement held by the Court to have been unfairly calculated to induce favorable votes. The ballot used in the election contained the following stipulation:

> It is hereby stipulated and agreed by and between the Town of Ocean Drive Beach and the above desribed territory that if the above described territory is included in the Town of Ocean Drive Beach that the Town of Ocean Drive Beach shall pass an Ordinance exempting all parcels of undeveloped real estate in excess of ten (10) acres owned by a person or persons from taxation until such property is developed or divided into lots.

The record indicates that the stipulation probably resulted from a special act relating to Ocean Drive Beach, which permitted that municipality to exempt from municipal taxation, any property, the exemption of which was not prohibited by the Constitution of this State.

The Court held that the stipulation constituted a misrepresentation and since it could have easily induced favorable votes by persons residing in the area to be annexed, it voided the election. But the opinion rendered in this case did not pass upon the important question raised by the appellent that the stipulation was void because it was unconstitutional. The Court simply saw fit to classify the stipulation as an empty promise, and therefore void; but since the South Carolina Statute, viz., Section 47-13, specifically authorizes the annexing corporation and the adjacent territory "to stipulate and

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1. 234 S.C. 172, 107 S.E. 2d 33 (1959).

agree upon terms of consolidation and such stipulations shall become a binding contract upon the city or town when enlarged . . . ," any stipulation that is not void for some specific reason would constitute a contract and would be enforceable. Therefore, to destroy the stipulation, it is necessary to pass upon the validity of the stipulation, and, in other words, to pass upon its constitutionality.

The lower court had likewise avoided the question, deeming it unnecessary and holding that even if the stipulation was unconstitutional, it would not cause an annexation, otherwise valid, to fail. No citation of authority supported this remarkable conclusion.

The result of the Supreme Court's decision in this case is, without doubt, correct because the stipulation was in fact invalid. But the invalidity of the stipulation does not rest upon its being "an empty promise," which influenced the votes of those living in the area to be annexed. For in order to avoid misrepresentation, the Statute requires the stipulations to be placed upon the ballot. Thus, it is intended that they influence votes. Therefore, since stipulations are authorized by the Statute, they can mislead only when they are incomprehensible or invalid. The stipulation here is capable of being understood. Thus, in order to be invalid, the stipulation here must violate some Constitutional provision.

In this case the stipulation was invalid because it is in direct conflict with the provisions of Section 1, Article X and Section 6 of Article VIII, both of which require uniformity of taxation. Furthermore, the Statute authorizing the tax exemption which formed the basis of the stipulation, is in itself invalid as special legislation violative of both Section I of Article VIII and Section 34 of Article III. Therefore, since it was invalid, it was misleading and "an empty promise."

The Supreme Court stated that it did not pass upon these Constitutional questions because of its established policy of avoiding decisions relating to the constitutionality of laws wherever it was possible. Such a principle is, of course, a correct one, but when the constitutionality, or lack of constitutionality, is essential to the decision, a ruling by the Court is required. Since in this case the stipulation was misleading because it was invalid and since further, the invalidity rests solely upon its unconstitutionality, the Constitutional questions should have been considered.

Necessity to Pursue Administrative Remedies Granted by Ordinances

Following the decision of the Supreme Court in 1955, in the case of *Richards v. City of Columbia*,[2] the City of Spartanburg adopted a Sub-Standard Housing Rehabilitation Ordinance similar to the Columbia Ordinance upheld by the Supreme Court's 3-2 decision in the *Richards* case, with the ommission of the portion held unconstitutional for vagueness.

The case of *DePass v. City of Spartanburg*[3] represents a challenge on the part of the property owner in Spartanburg to the validity of administrative orders issued pursuant to the Spartanburg Ordinance. The question for decision by the Supreme Court arose upon a decree sustaining a demurrer to a complaint in which the plaintiff had sought a holding that an Order, issued by Municipal Officials pursuant to the Ordinance, had the effect of depriving the plaintiff of her property without process of law. The statement of facts indicated that the enforcement of the Ordinance had been the subject of a serious dispute between the plaintiff and the municipal officials of Spartanburg. It appears that the plaintiff owns twenty-four rental units in Spartanburg, against most of which enforcement efforts (pursuant to the Ordinance) had been directed. The complaint alleged unnecessary and unreasonable inspections of those properties, an attitude of hostility on the part of those who sought to enforce the Ordinance and the failure of the City to provide certain services required of it by the Ordinance itself. The demurrer was upheld upon the ground that a Court of Equity would not take jurisdiction of the controversy until the plaintiff had exhausted all of the administrative remedies provided by the Ordinance. The Court also held that the contention that the City could not enforce the Ordinance until it had provided street paving and other improvements was "untenable because in any view it is not bound to do so in advance of plaintiff's rehabilitation of her substandard houses." A review of the Ordinance does not seem to condition enforcement upon performance by the City. The Ordinance makes the City responsible for "performing all services required by this Ordinance or any other Ordinance or policies of the City providing for city service to dwellings."

2. 227 S.C. 538, 88 S.E. 2d 683 (1955).
3. 234 S.C. 198, 107 S.E. 2d 350 (1959).

No specific obligation to pave the streets appears. Had the City entered into a specific obligation involving the expenditure of tax moneys at some future date, it is possible that such an obligation would constitute the incurring of bonded debt without an observance of the constitutional provisions relating thereto. This interesting and serious question does not appear to have been presented to the Court. It is likely that the Ordinance would be construed to mean that the City must — to the extent that tax moneys were available — render the contemplated services. An obligation of this sort would be valid and the City would be obligated to expend available moneys in such way that it provided service wherever possible. Flagrant discrimination against sections of the City could probably be enjoined.

The acceptance by the Court of the validity of this Ordinance without comment has significance. It is to be remembered that the 3-2 decision in the *Richards* case found the four members of the Court, (as now constituted), who had participated in the *Richards* decision, evenly divided. Justice Moss was not on that occasion a member of the Supreme Court, and it was the concurrence of Circuit Judge Lewis, sitting in place of then Chief Justice Baker, that had sustained the Columbia Ordinance. Justices Oxner and Legge had dissented from the majority opinion in the *Richards* case. Hence, the failure of these two Justices to comment on the validity of the Ordinance together with the absence of comment by Justice Moss, indicates that the Court as now constituted, regarded the *Richards* case as *stare decisis*.

It is to be hoped that this is true, for the importance of such Ordinances to the governing bodies of the larger municipalities in attempts to curtail the constant expansion of slum areas, was commented upon in an earlier review.[4] Basically, there is nothing harsh about this type of Ordinance. Those who own property in municipalities must recognize that overcrowded conditions frequently bring about harmful results. Illustrative, are the terrible slum areas of the larger metropolitan cities of the country which have spawned violence and contempt of law. While good living conditions are no guarantee that crime and juvenile delinquency will not flourish, nevertheless, good living conditions must be regarded as

4. 9 S.C.L.Q. 19 (1956).

a crime deterrent. The establishment of the medieval city required a surrender of certain feudal rights, but those who sought the safety afforded by the medieval municipality, gave up those rights. Similarly, one who acquires property in any municipality must be deemed to have given his consent to proper police regulation which is now generally recognized to permit the adoption and enforcement of Ordinances such as that adopted by Spartanburg designed to eliminate buildings unfit for human habitation. Many factors enter into the present flight to suburban living. But at least one factor is the failure of our cities to provide attractive residential areas in the older parts. If our cities are to survive, they must improve living conditions therein. Otherwise, they may well become mere jungles where only the criminal element will find haven.

Another point of significance in the present holding is that it reaffirms a principle of procedure that will inevitably become important when South Carolina is confronted with class actions in integration litigation. It must not be forgotten that the North Carolina statute prescribing in detail the administrative procedure to be followed by all who would seek enrollment in a public school other than the public school to which they had been assigned, was upheld by the Court of Appeals for the Fourth Circuit in a case in which certiorari was denied.[5] It will be comforting to those who may hereafter be forced to rely on just such a statute, to be able to point to a solid precedent in a case not involving segregation. For this reason too, the decision here assumes real importance.

Liability of Municipal Corporations for Defective Operation of Sanitary Sewer System

In the case of *Collins v. City of Greenville,*[6] the plaintiff sought to recover for damages sustained by his property when a sanitary sewer line in the City of Greenville, constituting a part of the publicly owned and operated sewage disposal system, clogged, causing sewage to back up and overflow the commodes in buldings owned by the plaintiff, with the result that hardwood floors and carpets in those buildings were ruined.

5. Carson v. Warlick, 238 F. 2d 724, *cert. denied,* 353 U.S. 981, 1 L. Ed. 2d 664, 77 S. Ct. 665 (1957).
6. 233 S.C. 506, 105 S.E. 2d 704 (1958).

The lower court had overruled a demurrer interposed upon the ground that the complaint did not set forth a cause of action, resting its decision on the reasoning that action or inaction by the City of Greenville in permitting the sewage line to clog and to overflow, constituted a taking of private property for public use without compensation, which gave rise to an action for damages as a consequence of that taking. The relatively recent case of *Webb v. Greenville County*,[7] which was reviewed in 10 S. C. Law Quarterly, Page 24, holds that under Section 17 of Article I of our Constitution, there is no distinction between the taking of property and the damaging of it, when the damage results as a consequence of some public project. This section of the Constitution has been held to be self-executing.

On appeal in the *Collins* case the Supreme Court reversed, pointing out that the kind of taking contemplated by Section 17 of Article I was taking (or damaging) which resulted from a situation basically permanent in nature. The Court said that this rule was not to be construed as a method by which to enlarge the waiver of sovereign immunity, relaxed only by the statute permitting suits for damages resulting from defects in streets.[8] The Court, quoting with approval from its earlier holding in the case of *Gasque v. The Town of Conway*,[9] said:

> . . . Ordinarily the constitutional provision under consideration contemplates compensation for a 'taking' or for damage which is permanent or presumably of a permanent nature, and growing out of a positive act or aggressive step. It was never intended to furnish a cause of action for every error of judgment committed or wrongful act perpetrated by a town council.

And to justify its conclusion, the Court said that the complaint in this case revealed that there was a single isolated instance (*viz.*, the clogging of the sewer) from which resulted the damage to the plaintiff. It held that in this case there was no degree of permanent taking in the constitutional sense, nor was there continuity over a period of time. The decision is eminently sound, and the discussion timely, because in view of the sweeping nature of statements made in some

7. 229 S.C. 267, 92 S.E. 2d 688 (1956).
8. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 47-70, As Amended.
9. 194 S.C. 15, 8 S.E. 2d 871 (1939).

of the earlier cases, the distinction made here should be emphasized by the Court. Indeed, the holding here clears the atmosphere.

As the result of its holding on this question, it became necessary for the Supreme Court to pass upon the second theory of recovery set out in the plaintiff's complaint. This was predicated upon the theory that the sewer was a part of the street, and that it was because of the mismanagement of the sewer that the damage resulted. For this reason, argued the plaintiff, Code Section 47-70 applied, and the case here was to be considered as a suit for damages arising from a defect in streets. Our Court has held—and quite properly so—that a storm sewer is a part of a street,[10] but clearly, a sanitary sewer, designed to collect and dispose of sewage, is something separate and distinct from the street.

Noting that earlier decisions had held that in order to sustain an action under this statute, the defect or mismanagement of the street had to relate to the maintenance of the street in relation to its use for safe travel, the Court quickly disposed of this contention of the plaintiff.

Limitation of Actions Resulting from Damages Which Constitute a "Constitutional" Taking by Reason of Section 17, Article I of the State Constitution

The South Carolina doctrine of absolute liability for damage to private property sustained as a consequence of a public use and the effect of the six-year statute of limitations upon such causes of action was reviewed by the Fourth Circuit Court of Appeals in disposing of the claim of Hilton for damages to his land by reason of the operation of the Wateree Dam by the Duke Power Company in a case brought by Hilton against that Company.[11] Wateree Dam had been constructed in 1919 by the Wateree Power Company. It was originally built to have 212 feet above sea level. In 1925 the dam was raised to 218 feet above sea level, and at all times since then the impounded waters have been maintained at that level. The Duke Power Company acquired the dam in 1927.

The case here involved four tracts of land and bristled with questions, but those questions arising as a consequence of

10. Marshall v. Rose, 213 S.C. 428, 49 S.E. 2d 720 (1948).
11. Hilton v. Duke Power Company, 254 F. 2d 118 (1958).

earlier condemnations and releases are not within the scope of this review.

In its review of the facts of the case, the Court of Appeals found that the evidence presented to the jury would sustain the jury finding that the actual injury had occurred within the six-year period of limitation, notwithstanding that the initial circumstances causing that injury had occurred long before. Since this last statement could easily pass as an oversimplification, it will be helpful to the lawyer interested in this question to refer to Judge Sobeloff's opinion, since it presents the South Carolina rule in language of unusual clarity.

> The effect of the statute of limitations and the extent to which it is applicable depend upon the nature of the cause of action and the time when it accrues. The South Carolina rule is that there is a taking within the meaning of the constitution, and consequently an accrual of a right of action, when 'neighboring real estate, belonging to a private owner, is actually invaded by superinduced additions of water, earth, sand or other material . . . . ' A neighboring landowner, however, acquires no rights against the owner of the dam and limitations do not begin to run until an actual injury occurs . . . . Once *some* actual injury is suffered, however, if the cause is permanent, non-negligent, and not subject to abatement, a single right of action accrues, in which the landowner must seek recovery for both past and future damages . . . .
>
> But the right to future damages, and the corresponding obligation to seek them in a single suit, are not automatic. The answer depends upon whether the 'permanency and extent' of the prospective injuries are, or should be, known to the landowner . . . . The rule has twin objectives. The first is to protect circumstances where a single action could fully adjudicate the rights of the parties. The other, equally important, is to avoid the injustice to plaintiffs of having limitations begin to run against them before their right to sue has matured.
>
> If the existing injury must necessarily continue or increase, and if the amount of the damage can be determined or estimated, the cause of action as to future damage accrues at once . . . . Whether the prospective injury

> is subject to reasonable estimation may involve consideration of complex factual data, and the question is ordinarily a proper one for the jury.

In this case, the Court of Appeals found that as to one of the four tracts of land involved, evidence had been adduced that actual damage had begun *only* within the six-year limitation period and that the award for damages therefor was proper.

The petition for rehearing filed by Duke Power Company was denied.[12] It was therein contended that:

> [T]he single cause of action which accrues when the slightest injury is occasioned includes any and all possible future injury, whether reasonably foreseeable or not.

The Court of Appeals said that this was not a correct view of the law on this question as applied in South Carolina. In so ruling it stood by its previously stated conclusion that:

> [T]he right to future damages and the corresponding obligation to seek them in a single suit are not automatic. The answer depends upon . . . 'the permanency and extent' to which [they] are or should be known.

Liability of Municipal Corporation for Damages Arising From Defect in Street Under Improvement for Municipality by County

The case here has an interesting economic aspect. It points up the extent to which political subdivisions of the State receive aid from the State, particularly the extent to which the State Highway Department assists incorporated cities and towns in the State in the construction and maintenance of streets and thoroughfares within the incorporated limits of such towns. The situation in South Carolina today is far different than it was a few decades ago. Formerly, the only improved streets and thoroughfares lay within the corporate limits of municipalities, and the desire to obtain proper streets was one of the impelling forces which brought about municipal incorporations and municipal annexations. But today in South Carolina nearly all of the important streets in all municipalities are maintained by the State Highway Department. The authorization for this stems from various legis-

12. 255 F. 2d 840 (1958).

lative enactments. Little, if any, new construction work is done by the municipalities themselves.

In the case here, a street in the City of Camden was being improved by Kershaw County pursuant to a provision of the Code permitting the Highway Department to contract with the counties themselves for the construction and improvement of "farm-to-market" roads. The term "farm-to-market" is a flexible one, for the street in the City of Camden here involved, was being improved under the "farm-to-market" road program and the work was being done by the County as the contractor of the State Highway Department. The plaintiff, who suffered an injury in the street allegedly by reason of a defect caused by the construction, brought suit against the City, the County and the State Highway Department. The trial court ruled that under Code Section 33-174, the municipality was liable and that no recovery was to be had against the Highway Department or against its contractor. On appeal, the municipality did not seek to hold the Highway Department liable, but contended that the County as a contractor was responsible for the damages suffered during the construction period. The Court held that the legislative enactment permitting counties to assume work ordinarily done by independent contractors did not make them a contractor within the ordinary sense of the word. The Court held that the County was a branch, or agency, of State Government and as such, was shielded by the sovereign immunity of the State. No startling principle of law is involved here.

Right of Recoupment Against the Sovereign

The case of *Mullins Hospital v. Squires Administrator*[13] presents an extremely interesting development in the doctrine of sovereign immunity. The case involved an attempt by Mullins Hospital, which is a public hospital established pursuant to legislative enactment,[14] to recover against the defendant for hospitalization afforded the defendant's decedent over a period of nearly two years. By way of defense, her administrator alleged that Victoria Squires had been a deaf mute and, prior to her entry to the hospital, had sustained a fracture of her hip, which should have been discovered by the hospital

13. 233 S.C. 186, 104 S.E. 2d 161 (1958).
14. 33 STATUTES, p. 758 (1905).

had any proper routine physical examination been made, and that through the negligence of the hospital in failing to discover the fracture, her hospitalization was vastly prolonged. The defendant also attempted to assert a counterclaim in tort for damages sustained by Victoria Squires as a result of the negligence of the hospital. Thus presented for consideration in this case is:

> 1. The question of tort liability of a public hospital engaged in a field which might be said to be proprietary in nature as distinguished from governmental; and
> 2. The right of recoupment against a claim of the governmental agency, notwithstanding that the basic right to sue the governmental agency might be denied.

The Court held that without doubt, the hospital was operated by a political subdivision of the State, and that the sovereign immunity from actions based upon negligence in the performance of governmental functions could be availed of by the political subdivision. It noted once again, that in South Carolina all functions exercised by political subdivisions are considered public and governmental in nature. The distinction, elsewhere made between functions deemed proprietary and functions deemed governmental, has no application in South Carolina. Furthermore, noted the Court, the sovereign immunity extends generally to all governmental agencies, and without a statute permitting suits in tort against governmental units, suits therefore cannot be maintained. On this basis, it denied the right of the administrator to recover for damages on its counterclaim.

Notwithstanding, however, it permitted the administrator to plead the defense of recoupment. The Court noted:

> Recoupment, unlike counterclaim, may result only in the reduction of the plaintiff's claim, and not in affirmative money judgment for any excess over that claim. Unlike set-off, it must grow out of the identical transaction that gave rise to the plaintiff's cause of action.
>
> 'Recoupment, therefore, is the right of the defendant to cut down or diminish the claim of the plaintiff in consequence of his failure to comply with some provision of the contract sought to be enforced, or because he has violated some duty imposed upon him by law in the making or performance of that contract. The delinquency or

deficiency which will justify the reduction of the plaintiff's claim must arise out of the same transaction, and not out of a different transaction.'

It may be of interest to note that a similar question is involved in the protracted, though not yet concluded, admiralty litigation relating to the collision damage to the Ashley River Bridge when struck by the tank steamer, Fort Fetterman, on October 1955.[15] In that admiralty cause, following the Highway Department's libel of the vessel, the ship counterclaimed for damages done to it, notwithstanding that there was no statute permitting such a counterclaim. By motion made to the District Court, the State sought a dismissal of the counterclaim on the grounds that the counterclaim was not consented to by statute, but the State agreed in argument that the claim might be asserted by way of recoupment.[16] The District Court, (A. H. Williams, U. S. District Judge), in an unreported decision, denied the motion to dismiss, holding that a Court of Admiralty was not interdicted by the Eleventh Amendment, and could consider the counterclaim and award damages against the State without its permission, irrespective of whether or not the State sustained its own libel. The order refusing the motion to dismiss was clearly interlocutory in nature. Notwithstanding, because of the serious and adverse long range effect that might result from an unchallenged holding on so important an aspect of States rights, an appeal was taken to the Court of Appeals for the Fourth Circuit, and orally argued as a petition for a writ of prohibition to prohibit the District Court from considering the counterclaim.[17] To support its position, the State cited *State v. Corbin and*

15. South Carolina Highway Department v. Charles Kurz and Company, 236 F. 2d 221 (1956).
148 F. Supp. 620 (1956).
242 F. 2d 799 (1957).
355 U.S. 826 (1957).
155 F. Supp. 359 (1957).
261 F. 2d 563 (1958).
268 F. 2d 27 (1959).

16. The State argued that under the Eleventh Amendment to U. S. Constitution its consent through Statutory Enactment was indispensable to the right to counterclaim.

17. The U. S. Courts of Appeals are denied the right to review interlocutory decrees which do not finally determine the rights and liabilities of the parties. 28 USCA 1292 (3). However, notwithstanding, Federal Appellate Courts have, on occasion, through the consideration of applications for mandamus and prohibition, indirectly effected a review of orders purely interlocutory in nature. Compare in re State of New York, et al., 256 U. S. 490, 65 L. Ed. 1057, 41 S. Ct. 588 (1921).

Stone,[18] referred to in Justice Legge's opinion to the effect that the State's immunity to suit in tort is not removed merely by reason of the fact that the State becomes a plaintiff. The State also relied upon a brief opinion by Judge Simonton in the case of *Port Royal and Augusta Railway Company v. The State of South Carolina,*[19] in which Judge Simonton, in an equity case, had permitted recoupment against the State while recognizing that a counterclaim could not lie unless the State had consented to be sued.

The Court of Appeals, after an unusually lengthy oral argument, dismissed the appeal, holding that the order below was clearly interlocutory and that the State's rights would be preserved following a determination of the merits of the case. Thus has the State, so far, partially destroyed Judge Williams' order as an important precedent, for a ruling by the Court of Appeals on the correctness of his order has been reserved. Since the State has so far been successful in asserting its claim, it is unlikely that this litigation will result in a ruling on the part of the United States Courts as to whether the counterclaim could have been sustained, even though the State should fail in its efforts to uphold its claim for damages. But even without Judge Legge's opinion, the State had conceded that while no counterclaim could be allowed, recoupment was in order. If the question ever gets to the United States Supreme Court the decision in this case will be further authority to support the State's motion to dismiss.

Power of County Boards of Education to Subdivide Existing School Districts

The dispute here arose as a consequence of action taken by the County Board of Education of Marion County in dividing what had been School District No. 3 into two separate School Districts. School District No. 3 was itself a consolidation which had occurred following the enactment of the School Law of 1951.[20] The question involved was extremely narrow and related merely to the construction of the applicable legislation.[21] It was there provided that:

18. 16 S.C. 533 (1881).
19. 60 Fed. 552 (1894).
20. 47 STATUTES p. 546, 662 (1932).
21. CODE OF LAWS OF SOUTH CAROLINA, 1952, §21-112.

"Unless otherwise expressly provided, the school districts of the various counties shall not be altered or divided except:

"(1) By act of the General Assembly relating one or more counties; or

"(2) By authorization of the county boards of education under the following conditions:

"(a) With the written approval of the Senator and the entire house legislative delegation from the county involved;

"(b) Upon a written petition, signed by at least four fifths of the qualified electors embraced within the limits of each of the school districts involved, . . . or

"(c) . . . if such consolidation be approved favorably by a majority of the qualified electors of each of the school districts . . ."

The contention was made that in order to alter the boundaries of the consolidated School District it was necessary that a compliance be effected with Subparagraphs (a) and (b) above quoted. The Court held that a compliance with (a) alone was sufficient.

For a somewhat parallel situation relating to the power of the State Educational Finance Commission to alter the lines of the School Districts located in more than one county, reference should be had to the case of *Powers v. State Educational Finance Commission.*[22] The *Powers* case, incidentally, is an important decision in the field of public education in South Carolina for it specifically holds that no constitutional barrier is imposed by Section 5 of Article XI as now written to the creation of a School District constituted of parts of more than one County.

22. 222 S.C. 433, 73 S.E. 2d 456 (1952).