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Property

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PROPERTY

I. EASEMENTS

A. *Broad or Unity Rule*

In *Blue Ridge Realty Co. v. Williamson*[1] the court restated and broadened somewhat the "broad or unity" rule with respect to easements acquired by grantees who purchase with reference to the grantor's plat.[2]

Stated briefly, the rule in South Carolina has been that a buyer, purchasing with reference to a plat, has an implied easement in all the streets and alleys shown on that plat.[3]

This easement is sometimes confused with those which arise in favor of the public by dedication when the streets are laid out and are accepted by the public. The individual, private easement here comes into being not by dedication, but by implied grant and is not dependent upon the creation or perpetuation of any right in the public.[4]

In *Williamson* the respondent had purchased and fenced off a "turn-around" portion of a street on which his and the appellant's lots abutted. The court held, in line with the settled rule, that the wall must be removed and the appellants allowed to use the circle since the appellants had acquired an easement therein when they purchased with reference to the sub-divider's plat.

The court used language that seems to go further than necessary when it said, "The purchasers . . . acquired every easement, privilege and advantage shown upon said plat, including the right to the use of all streets, near or remote, as laid down on the plat. . . ."[5]

Billings v. McDaniel,[6] the case so frequently relied upon for the point involved here, and *Newton v. Batson*,[7] a 1953 decision, both contain, in addition to statements similar to the one quoted

1. 247 S.C. 112, 145 S.E.2d 922 (1966).

2. For a statement of the doctrine in South Carolina see, 6 S.C.L.Q. 96, 102 (1953).

3. Corbin v. Cherokee Realty Co., 229 S.C. 16, 91 S.E.2d 542 (1956); Outlaw v. Moise, 222 S.C. 24, 71 S.E.2d 509 (1952); Billings v. McDaniel, 217 S.C. 261, 60 S.E.2d 592 (1950).

4. Corbin v. Cherokee Realty Co., *supra* note 3, at 25, 91 S.E.2d at 546.

5. Blue Ridge Realty Co. v. Williamson, 247 S.C. 112, 119, 145 S.E.2d 922, 925 (1966).

6. 217 S.C. 261, 60 S.E.2d 592 (1950).

7. 223 S.C. 545, 77 S.E.2d 212 (1953).

above, the following, "he [the lot owner] is at once entitled to have all such streets and alleys opened for his use, *necessary to the enjoyment of his property*."[8]

By omitting all reference to this sentence in those decisions, the court now would seem to intend to allow any lot owner qualifying under this rule to successfully oppose any variance from the plat in the layout of streets or other passageways, regardless of the actual damage or inconvenience to him.

B. *Easements in Gross—Transferability*

In *Sandy Island Corp. v. Ragsdale*[9] the court took an opportunity to add a new dimension to the law surrounding easements in gross in South Carolina. Prior to this decision, the court had consistently held that easements in gross are of a personal nature, are not transferable, assignable or divisable, and die with the owner thereof.[10] The effect of this unswerving position has been that litigation concerning transferability has heretofore been restricted to discerning whether a certain easement was one appurtenant or in gross (absent further restrictions in the granting instrument).[11]

In *Ragsdale* the fact that the right-of-way concerned had no terminus on the easement holder's land—the presence of which is a *sine qua non* for appurtenance in this state[12]—disposed of any question as to the nature of the easement. The right claimed was in a roadway leading from a public road to a river landing, and had been reserved by appellant Ragsdale's grantor, the Williams Furniture Corp., for the purpose of allowing it to continue certain logging operations. The court found, from the language of the deed between Williams and the appellant, that the original parties had intended that Williams be able to transfer the right-of-way.

Though this intention would ordinarily have been meaningless, the court held that when the terms of the instrument made the easement in gross assignable and the easement was one of a *commercial character*, its alienability would be upheld.

8. Billings v. McDaniel, 217 S.C. 261, 265, 60 S.E.2d 592, 594 (1950); Newton v. Batson, *supra* note 7, at 549, 77 S.E.2d at 213. (Emphasis added.)

9. 246 S.C. 414, 143 S.E.2d 803 (1965).

10. Steele v. Williams, 204 S.C. 124, 28 S.E.2d 644 (1940); Brasington v. Williams, 143 S.C. 223, 141 S.E. 375 (1927).

11. See Safety Bldg. & Loan Co. v. Lyles, 131 S.C. 542, 128 S.E. 724 (1925).

12. Steele v. Williams, 204 S.C. 124, 130, 28 S.E.2d 644, 646 (1940); Brasington v. Williams, 143 S.C. 223, 245, 141 S.E. 375, 382 (1927).

The distinction, said the court, lies in the fact that an ordinary easement in gross is merely for personal enjoyment. An easement of this type for commercial purposes, however, is to promote economic benefit rather than personal satisfaction and, in line with the view expressed in the Restatement of Property,[13] is transferable.

II. NUISANCE

The "balance of convenience" doctrine, with respect to the law of nuisances, is recognized to some degree in almost all of the states.[14] Though it is sometimes suggested that the relative rights of individuals should be balanced before issuing an injunction,[15] the usual practice is to balance only when the success of an injunction-seeking plaintiff would be contrary to public interests and convenience.[16]

South Carolina's position on this doctrine, despite the emphatic, all inclusive language of some decisions, would still seem to be unsettled.[17]

In *Dill v. Dance Freight Lines*[18] our court was asked to change the stolid position indicated by its previous decisions. The fact situation was that respondent Dill's house was constantly being dirtied by clouds of dust emanating from appellant freight line's unpaved truck terminal. Respondent sought, and was granted, damages and a prohibitory injunction.

Appellant's principal line of argument was that, though based on ample precedent, a statement by the trial judge—"The jury having found for the plaintiff; the plaintiff is entitled to an injunction"[19]—was a statement of law no longer valid nor in

13. RESTATEMENT, PROPERTY § 489 (1936).

14. See, *e.g.*, Harrisonville v. Dickey Clay Mfg. Co., 289 U.S. 334 (1933); Hyde v. Somerset Air Service, 1 N.J. Super. 346, 61 A.2d 645 (1948); Canfield v. Quayle, 170 Misc. 621, 10 N.Y.S.2d 781 (1939).

15. Harrisonville v. Dickey Clay Mfg. Co., *supra* note 14, at 338.

16. 66 C.J.S. *Nuisances* § 16 (1950).

17. References in other parts of this section will demonstrate the language referred to. As to the "unsettled" state of the law, this writer has been unable to discover any South Carolina case in which public and private interests were so opposed that the granting of the injunction would have been contrary to the public welfare. The issue has arisen only once and then was avoided because the public interest could be served in another way. State v. Columbia Water Power Co., 82 S.C. 181, 63 S.E. 884 (1908). In this case a pipe to carry drinking water to the city of Columbia was held a nuisance because it obstructed a navigable waterway, but other ways were found to conduct the water to its destination.

18. 247 S.C. 159, 146 S.E.2d 574 (1966).

19. *Id.* at 162, 146 S.E.2d at 575. The court cited Threatt v. Brewer Mining Co., 49 S.C. 95, 26 S.E. 970 (1897).

keeping with new trends in the law of nuisance. He argued that the trial court should have taken additional testimony with reference to the balance of convenience and advantage between the parties.

The court disagreed, and repeated the constitutional basis for the South Carolina position:

> Whatever may be the doctrine in other states, under the provisions of the Constitution of this state, that private property shall not be taken for private use without the consent of the owner, the court could not have considered, in deciding whether to grant or refuse the injunction, the question raised . . . as to the balance of convenience. . . .[20]

The court also cited the fairly recent decision of *Davis v. Palmetto Quarries Co.* where it was said: "The court was influenced to strike the quoted allegations because of their apparent purpose to raise the *irrelevant question* of balance of convenience and advantage, and we agree."[21] At least insofar as private nuisances are concerned, it still does.

In another nuisance action, that of *Welborn v. Page*,[22] landowners brought a suit to enjoin defendants from locating an automobile wrecking yard on certain property. The plaintiffs insisted that such an activity would constitute a nuisance.

The court first noted that, on the facts before it, the proposed business would not constitute a nuisance per se, though it could become one per accidens. The fact that a certain activity may become a nuisance if carried on in a negligent or careless fashion, however, is no grounds for granting an injunction. It must appear that a nuisance will inevitably or necessarily result before the proposed activity will be enjoined.[23] Furthermore, so long as the operation is a lawful one, the fact that neighboring property values are lowered is no indication that a nuisance exists.[24]

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20. Williams v. Haile Gold Mining Co., 85 S.C. 1, 7, 66 S.E. 117, 118 (1909).

21. 212 S.C. 496, 500, 48 S.E.2d 329, 331 (1948). (Emphasis added.)

22. 147 S.C. 554, 148 S.E.2d 375 (1966).

23. *Id.* at 561, 148 S.E.2d at 379; Strong v. Winn-Dixie Stores, Inc., 240 S.C. 244, 125 S.E.2d 628 (1962).

24. Welborn v. Page, 147 S.C. 554, 561, 148 S.E.2d 375, 381 (1966); Strong v. Winn-Dixie Stores, Inc., *supra* note 23, at 256, 125 S.E.2d at 634.

III. EMINENT DOMAIN

As is the usual case, the principal problems arising in the eminent domain area were (1) is the loss one for which the government must repay the owner and (2) what shall be included in determining the owner's loss?

South Carolina State Highway Dep't v. Allison[25] presented the court with an opportunity to extend a rule to rural areas already settled for urban landowners.

Respondent Allison owned a tract of land which bordered on U.S. Highway 29. The highway department, pursuant to its plans to construct a controlled access superhighway over the old highway 29 roadbed, had instituted condemnation proceedings. The result of these proceedings, *inter alia*, was that Allison was no longer to have direct access to the main highway, but would now have to travel some seven-tenths of a mile along a "frontage road" to the nearest highway entrance. He sought compensation for the loss of this access.

The court observed that in this state the "right of access" has long been recognized as a property right, and though preceding cases have dealt only with urban property, the principle is equally applicable to rural lands.[26] The fact that the plaintiff is able to reach the highway by another route will affect only the amount of his damages, not his right to recover.[27] The measure of that damage is the adverse effect the loss of access has on the fair market value of the property.[28]

In *South Carolina State Highway Dep't v. Touchberry*[29] the court gave a good indication of what is encompassed by the

25. 246 S.C. 389, 143 S.E.2d 800 (1965).

26. *Id.* at 393, 143 S.E.2d at 802. The court also found what was interpreted to be legislative support for its decision in the South Carolina Code, § 33-217 (1962), the pertinent parts of which read:

> *Acquisition of property for controlled access facilities; rights of abutting owners*—The Department may acquire such lands and property, including rights of access, as may be needed for controlled access facilities by . . . condemnation, in the same manner as now . . . authorized by law for acquiring property or property rights in connection with other State highways.

And at § 33-219.3 which provides for judicial review of the Highway Department's decisions to close access roads—"Provided, however, that the above procedure . . . shall in no wise abrogate or deny any property owner's rights as to relief under any existing law relating to the condemnation of property."

27. *Ibid. Accord,* Sease v. City of Spartanburg, 242 S.C. 520, 131 S.E.2d 683 (1963); Brown v. Hendricks, 211 S.C. 395, 45 S.E.2d 603 (1947).

28. 246 S.C. 389, 392, 143 S.E.2d 800, 801 (1965).

29. 248 S.C. 1, 148 S.E.2d 747 (1966).

words "any special damages" in section 33-135 of the code,[30] which provides for the damages to be considered when computing a landowners recompensable loss. It should be remembered at the outset that the only measure of damage done is the decline in the fair market value of the land on the basis of its most advantageous and profitable use—no allowance is made for loss of future profits.[31]

In *Touchberry* the highway department had constructed a controlled access highway across the plaintiff's land. The plaintiff asked that in assessing the value of the damage the jury be allowed to consider four elements of "special damage," namely; increased traffic noise at the landowner's residence, loss of breeze because of the elevation of the new highway, loss of view for the same reason, and circuity of travel between the portions of his farm now separated by the highway. The court held that when a part of a tract is physically appropriated, special damages, including *all* detrimental consequences of the taking and use of the land, may be considered in determining the diminution of the remainder's value. The breadth of the rule as it now exists in South Carolina is indicated by the court's quoting with approval the following from *Nichols, Eminent Domain*: "The different elements of damage to remaining land recoverable when part of a tract is taken are as numerous as the possible forms of injury."[32]

Lindsey v. City of Greenville[33] simply added another factual example of what constitutes a "taking for public use" within the meaning of article 1, section 17, of the Constitution of South Carolina. The plaintiff owned land just below a dam constructed by the city. Subsequent to an unusually hard rain the dam's floodgates were opened to protect the defendant's project and the excess water from the reservoir flooded the plaintiff's land, destroying a bean crop planted thereon.

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30. S.C. CODE ANN. § 33-135 (1962). *"Actual value and special damages to be considered.*—In assessing compensation and damages for rights of way, only the actual value of the land to be taken therefor and any special damages resulting therefrom shall be considered."

31. South Carolina State Highway Dep't v. Bolt, 242 S.C. 411, 131 S.E.2d 264 (1963).

32. 4 NICHOLS, EMINENT DOMAIN § 14.24 at 556 (3d ed. 1962).

33. 247 S.C. 232, 146 S.E.2d 863 (1966).

The city, relying on *Collins v. City of Greenville*,[34] sought to establish that this was an isolated occurrence, not likely to happen again nor of a permanent nature, and therefore not a "taking" within the meaning of the constitution. The court rejected this argument, pointing out that the dam was a public project and that the plaintiff's loss had been caused by the regular operation of the project. Finally, since it appeared that this inundation would in all probability recur, the destruction of the crop was held to be a "taking for public use" within the meaning of the constitution.

IV. COVENANTS FOR TITLE

Lancaster v. Smithco, Inc.[35] presented the converse of the situation (as regards the effect on the rights of the parties of a plat which is referred to in a deed) in *Blue Ridge Realty Co. v. Williamson*,[36] discussed elsewhere in this article.

A general rule, well settled in South Carolina, is that a general warranty deed includes a covenant that the land is free from all encumbrances not expressly excepted from its provisions.[37] The requirement that any exceptions be incorporated in the deed itself is not relaxed by reason that the grantee has knowledge of an encumbrance prior to the time of conveyance.[38]

In the instant case the plaintiffs had purchased a house and lot from the defendant, receiving a general warranty deed which described the lot "as shown" on a certain recorded plat. At the time of the transaction a gas pipeline corporation held an easement across the lot. The easement had been duly recorded and was shown by a dotted line upon the plat to which the plaintiffs were referred on their deed.

The court held that the reference, though sufficient to incorporate the plat for the purpose of determining metes and

34. 233 S.C. 506, 105 S.E.2d 704 (1958). In this case the plaintiff's buildings were damaged when city-owned sewer lines became clogged, causing sewage to back up and overflow commodes in the buildings. The court disallowed recovery under eminent domain theories since the acts were of a temporary nature, constituted an isolated instance and arose from no positive act of the city.

35. 246 S.C. 464, 144 S.E.2d 209 (1965).

36. 247 S.C. 112, 145 S.E.2d 922 (1966).

37. Lessly v. Bowie, 27 S.C. 193, 3 S.E. 199 (1887); Jeter v. Glenn, 9 Rich. L. 374 (S.C. 1856).

38. Sanders v. Boynton, 112 S.C. 56, 98 S.E. 854 (1919).

bounds,[39] was not enough to except the encumbrance shown thereon from the guarantees of the general warranty.

V. EJECTMENT

The common law practice of allowing an unlimited number of actions for ejectment[40] is no longer recognized in South Carolina. Section 10-2402 of the code limits the plaintiff to two trials on the same cause of action. It changes no other part of that common law doctrine, however, so that no issue decided at the first trial of the matter is res judicata to the second.[41]

In *Ladd v. DuPre*[42] everything was in order for bringing the second suit—it was an action for the recovery of the possession of real property and the costs of the first action were paid—except that the plaintiff was the defendant in the first trial. Having suffered an adverse judgment in the first suit, the former defendant brought this action and sought to avoid a defense of res judicata by arguing that the provisions of section 10-2402 apply to *either* party in an action for ejectment.

The court, analyzing the section in the light of its common law background, rejected the plaintiff's reasoning, saying that the section simply meant "that a party out of possession, who loses his first action, shall have a second action, but [the section] was never intended to modify the doctrine of res judicata."[43]

VI. ZONING

When a landowner seeks to force a municipality either to grant him a variance or change the zoning ordinance itself, the usual formula for solving the problem has been to ascertain whether the ordinance is so unreasonable as to impair or destroy constitutional rights.[44] *Rush v. City of Greenville*[45] gave the

39. S.C. CODE ANN. § 60-208 (1962). See also, Blue Ridge Realty Co. v. Williamson, 247 S.C. 112, 145 S.E.2d 922 (1966).

40. This was accomplished by the use of fictitious leases, entries, ousters, and "tenants" substituted for the real parties in interest. Since the adversary "tenants" were never the same, the principle of res judicata never applied and the plaintiff was limited only by the number of fictitious "straw men" he could imagine—John Doe, Richard Roe, et al. See Carr v. Mouzon, 93 S.C. 161, 76 S.E. 201 (1912); Columbia Water Power Co. v. Columbia Land & Inv. Co., 42 S.C. 488, 20 S.E. 378 (1894).

41. Williams v. Wannamaker, 122 S.C. 368, 115 S.E. 637 (1923).

42. 247 S.C. 328, 147 S.E.2d 253 (1966).

43. *Id.* at 331, 147 S.E.2d at 255.

44. Bob Jones Univ. v. City of Greenville, 243 S.C. 351, 133 S.E.2d 843 (1963); James v. City of Greenville, 227 S.C. 565, 88 S.E.2d 661 (1955).

45. 246 S.C. 268, 143 S.E.2d 527 (1965).

court an opportunity to reaffirm this and other principles on which it has previously adjudicated zoning controversies. Perhaps the most important of these is the self-restraint to which the court has committed itself in this area.

> There is a strong presumption in favor of the validity of municipal zoning ordinances . . . and where the Planning and Zoning Commission and the city council of a municipality has acted after considering all the facts, the Court should not disturb the finding unless such action is arbitrary, unreasonable, or in obvious abuse of its discretion.... Likewise, the power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations.[46]

The facts in this case were that respondent Rush had purchased a lot suitable for commercial purposes on a street whose frontage was zoned "E-Local Commercial" to a depth of approximately 150 feet. He had also purchased a strip or "tail" of land running from the back of this lot to the street on the other side of the block. The strip measured about 22 feet by 102 feet and lay in an area zoned "A-1 Single Family Residential". The respondent asked for and was denied a variance which would have allowed him to use the strip as a driveway entrance to a business establishment he planned to erect on the main lot. The city council announced that they found it "undesirable" to allow an entry to the proposed business in the residential neighborhood.

The court declared first, that the actions of the city council were not unreasonable and second, that the respondent could not plead unnecessary hardship when he had purchased the strip with actual or implied knowledge of the zoning ordinance.[47] The court also found that though the purchase of the strip had reduced the lot from which it was taken to less than the mini-

46. Bob Jones Univ. v. City of Greenville, 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963).

47. Rush v. City of Greenville, 246 S.C. 268, 278, 143 S.E.2d 527, 532 (1965). "Ordinarily," said the court, "a claim of unnecessary hardship cannot be based upon conditions created by the owner nor can one who purchases property after the enactment of a zoning regulation complain that a nonconforming use would work an unnecessary hardship upon him."

mum square footage required for "A-1 Single Family Residential", it was the deliberate and arbitrary act of the respondent and his grantor that had brought about this result and they were therefore barred from asserting this fact in their defense.

VII. Automobile Lien Statute

Section 45-551 of the South Carolina Code provides that when a motor vehicle is negligently or lawlessly operated and causes damage to persons or property, the person suffering such damage shall have a lien on the vehicle, second to that of the state or county for taxes, for the amount of the damages recoverable therefrom. It has been decided that such lien dates back to the time of the injury[48] and that the lien attaches as of the moment of the injury.[49] Though he may not have a vested interest in the vehicle until final judgment is rendered, the injured party's contingent interest is sufficient to place in him a special interest as a positive security for the payment of any forthcoming judgment.[50]

In *Ex parte First Pennsylvania Banking & Trust Co.*[51] the plaintiff, a native of South Carolina, had been involved in an accident with a Pennsylvania automobile in North Carolina. The Pennsylvania vehicle was taken to South Carolina where the plaintiff commenced an action to have it attached under authority of section 45-551.

Our court held that despite the absence of territorial restrictions in the law, the effect of the statute outside the borders of the state was governed by the rule of *Pennoyer v. Neff*[52] which, as it applies in this case, declares, "that the laws of one State have no operation outside of its territory, except so far as is allowed by comity. . . ."[53] The result is that the statute has no effect on the rights of parties arising from an out-of-state collision. No lien will come into being at the time of the collision nor when the vehicle is transported into South Carolina.

48. United States v. One 1957 Model Tudor Ford, 167 F. Supp. 864 (E.D. S.C. 1958); State v. Campbell, 159 S.C. 128, 155 S.E. 750 (1930).
49. Stephenson Fin. Co. v. Burgess, 225 S.C. 347, 82 S.E.2d 512 (1954).
50. Stewart v. Martin, 232 S.C. 483, 102 S.E.2d 886 (1958).
51. 247 S.C. 373, 148 S.E.2d 373 (1966).
52. 95 U.S. 714 (1878).
53. *Id.* at 722.

VIII. MISCELLANEOUS

Other cases of interest which are not fully commented upon are:

Elliott v. Snyder, 246 S.C. 186, 143 S.E.2d 374 (1965). Where a check given by a purchaser of land was returned to the vendor marked "drawn against uncollected funds", it was held to be incumbent upon the vendor to attempt to collect the amount by redeposit of the check before he could consider the contract null and void for default in payment.

First Baptist Church v. Turner, 248 S.C. 71, 149 S.E.2d 45 (1966). The words "unto the said Baptist Bethel Church and their successors as long as the said Baptist Bethel Church shall continue the worship of God at that place" were held to constitute a fee simple conditional estate, that by converting it to other uses the fee had been lost, and that continued claim by the church for sixty years had resulted in an ouster of the grantor's heirs and perfection of title by adverse possession in the church.

Miller v. Rodgers, 246 S.C. 438, 144 S.E.2d 485 (1965). Language in a will providing that on the death of a life tenant the testator's "living children" and the children of any deceased child should take the remainder, share and share alike, was held to give these persons contingent interests in a per capita distribution of the property. The language gave no vested interest since the class would not be determined until the death of the life tenant.

Jeffords v. Berry, 247 S.C. 347, 147 S.E.2d 415 (1966). Held section 57-301 of the South Carolina Code to mean that a conveyance will be set aside when the transfer is made with actual intent to defraud creditors (intent imputable to grantees) regardless of consideration. The conveyence will likewise be set aside when no intent to defraud is shown but there is no consideration; any consideration, even that which is "grossly inadequate" will suffice in the absence of fraud.

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