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PUBLIC CORPORATIONS

THEODORE B. GUERARD and HUGER SINKLER*

Right to Condemn Land Devoted to Public Use

In the case of *Riley v. South Carolina State Highway Dept.*[1] the Court had before it the question whether the State Highway Department under its statutory power of eminent domain can condemn for a highway, land which is already devoted to another public use, in this case an orphanage.

The property in question had been acquired for the establishment of an orphanage by the Trustees of the John K. Crosswell Home, who had erected suitable buildings thereon. The trustees instituted this action to enjoin the State Highway Department and the city of Sumter from condemning a ninety foot strip through the property for a proposed relocation of U. S. Route 15.

Advanced in support of the Trustees' position was the decision in *County Bd. of Comm'rs. v. Holladay*[2] where the Court had held that under the general rule a public body, acting under the general power of eminent domain granted it by statute, is not empowered to condemn property already devoted to a public use and that such power must be specifically given by the Legislature.

In the case under review the Court recognized the general rule laid down in the *Holladay* case, but said that the general rule does not apply against the sovereign itself, the State of South Carolina, which in this case was acting through one of its agencies, the State Highway Department.

The decision held in the alternative that, although the general rule should be given effect, the power of condemnation of the orphanage's property is necessarily implied from the statutory authority granted the State Highway Department to condemn property. The Court reasoned:

> In determining whether there is such implication, due consideration must be given to the nature and situation

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

1. 238 S. C. 19, 118 S. E. 2d 809 (1961).
2. 182 S. C. 510, 189 S. E. 885 (1937).

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> of the proposed work, and the impracticability of constructing it without encroaching on land already used by the public . . . A public highway cannot in the nature of things be constructed for any considerable distance through an inhabited country, without crossing property devoted to some other public use. Certainly the Legislature never intended that property of the nature involved should be excluded from the broad power of the condemnation given.

The opinion here is sound and the reasoning that there is a distinction between the power of the State itself and the power of its lesser units is well taken.

County Can Lawfully Fulfill Agreement Set Forth In Deed By Which It Acquired Property

In the case of *Byars v. Cherokee County*[3] the Court had before it the question of the relative rights of a County and a property owner from whom the County had acquired property under a deed providing for the right of repurchase in the event a specified use thereof was discontinued.

Cherokee County had been authorized in the Cherokee County Supply Act for the year 1945 to expend a particular appropriation in part "for a purchase . . . of a site for a potato curing house . . . and the title of the said property shall be taken in the name of Cherokee County."[4] Pursuant to this authorization, the County acquired .415 of an acre of land from the plaintiff, W. F. Byars, by deed containing the following proviso:

> Provided that in case the said lot of land shall cease to be used by the County of Cherokee for curing house purposes that the said Forrest Byars shall have the right to repurchase the said lot and have the same reconveyed to him upon payment of the said purchase price of $50.00, Cherokee County to have the right to remove therefrom at any time any improvements placed on the said land if desired.

Subsequently in the spring of 1947 the building erected on the property ceased to be used for curing house purposes; in 1950 the County Board of Commissioners, pursuant to a

3. 237 S. C. 548, 118 S. E. 2d 324 (1961).
4. Act No. 274 of 1945.

duly passed resolution, reconveyed the property for $50.00 to the plaintiff, W. F. Byars. (The building on the property had been previously sold at public auction to a third party whose rights were subsequently acquired by the plaintiff.) In 1957 the property was condemned by the State Highway Department and the check for the amount of the condemnation award was made jointly payable to Cherokee County and W. F. Byars; the latter then instituted this action to have the court to affirm his title to the building and the land.

The County took the position, *inter alia,* that the County Board of Commissioners of Cherokee County had no authority either to sell the building or to reconvey the property in question to the plaintiff and that its actions in so doing were void and ultra vires.

In approaching the question before it, the Court was faced with its decision in *Williams v. Wylie*[5] where it held that under the general rule the Board of Commissioners of Lancaster County in the absence of specific authorization could not make a valid conveyance of County property. As in the *Williams* case there was no enabling legislation here authorizing the reconveyance to the plaintiff. The Court, however, upheld the power of the County Board of Commissioners in the instant case to reconvey the property to the plaintiff. In reaching this conclusion the Court held that the conveyance to the plaintiff "was the fulfillment and the performance of a condition stated in the deed by which the appellant obtained title to the property in question."

This conclusion is entirely sound. Even though it might be argued that the original legislation in 1945 required the County to obtain a site in fee simple and without the reversionary interest which it actually agreed to, the County could not contend on the one hand that the action taken pursuant to the 1945 legislation was void and at the same time retain the fruits of the contract made in violation thereof. If it contended that the contract thus made was void, it would be compelled to give back the consideration which it still held.

However, the Court goes further and apparently upholds the action of the County Board in effecting the sale of the building and the reconveyance of the site upon the theory of estoppel. This part of the holding causes some concern. As

5. 217 S. C. 247, 60 S. E. 2d 586, 21 A.L.R. 2d 71 (1950).

pointed out by Chief Justice Stukes in *Powell v. Board of Comm'rs*[6] it is a general rule that the doctrine of estoppel does not lie against the United States or one of the States. The reason for this is well taken; for if the public could be estopped by unauthorized or wrongful acts of its officials, unlimited harm would result.

Illustrating this principle is the important decision of Chief Justice Blease in the case of *Farrow v. City Council.*[7] In that case a city official gave out erroneous information with respect to certain paving liens. This was relied upon by one buying a large piece of property to his subsequent loss, but the Court denied the right of the purchaser of the property to escape payment of the assessments, holding that the act of the city official was unauthorized.

In the case of *Bolton v. Wharton,*[8] an innocent purchaser sought to recover upon certain alleged tax anticipation notes of the city of Union which were given to provide funds to promote the construction of a silk mill in the city of Union. The mill was never built and the stock which the city was to receive was never issued. Recovery was denied because the Court found that the so-called tax anticipation notes were improperly issued and the city had received no benefit therefrom.

No discussion of the doctrine of estoppel as applied to public bodies should be undertaken without reference to two leading cases on the subject, which were both handed down by the Supreme Court of South Carolina.

In the much cited case of *Luther v. Wheeler*[9] written by the distinguished jurist, the late C. A. Woods, the Court denied recovery upon a note given by the Town of Prosperity to build a Town Hall and Guard House but did permit a recovery quantum meruit to the extent that the Town had actually received benefit from the proceeds of the note.

In a later decision written by the late Judge A. L. Gaston, in the case of *U. S. Rubber Prods. v. Town of Batesburg,*[10] a recovery was allowed against the Town of Batesburg for the

6. 210 S. C. 136, 41 S. E. 2d 780, 1 A.L.R. 2d 330 (1947).
7. 169 S. C. 373, 168 S. E. 952 (1933).
8. 163 S. C. 242, 161 S. E. 454, 86 A.L.R. 1101 (1931).
9. 73 S. C. 83, 52 S. E. 874 (1905).
10. 183 S. C. 49, 190 S. E. 120, 110 A.L.R. 144 (1936).

purchase of fire hose upon the same ground, but in both instances the limit of the recovery was the extent to which the city actually received benefit for a lawful corporate purpose, and the recovery was not measured by the quantum of the note or other obligation upon which the municipal corporation was sued. The distinction is extremely important and can be applied here, for here the county still had the property which was the consideration for the contract which it made in 1945 (albeit illegally). Such a situation is clearly differentiated from the situation in the *Bolton* case where the city got nothing for the note.

In the instant case the opinion seems to apply the doctrine of estoppel to the action taken by the County Board in selling the property and effecting the reconveyance. Since this action was not authorized by appropriate legislation, it is difficult to see how the County could be estopped upon this unauthorized act. Even in those cases finding estoppel resulting from a contractual relationship, the person seeking to rely upon the doctrine must prove the authorization for the contract. Indeed, this much of the holding seems to run contrary to the doctrine currently applied in the *Williams* case. But since the entire discussion of the subject of estoppel was unnecessary to the result, it would seem to follow that it should be treated as obiter dicta.

Contributory Negligence of Third Person Defined

In the case of *Pinkston v. Morrall*,[11] the Court considered the right of the plaintiff to maintain an action for personal injuries against the city of Beaufort in a case where such injuries were admittedly caused by the concurrent negligence of a third person.

The action was brought under Section 47-71 of the SOUTH CAROLINA CODE OF LAWS of 1952 in the absence of which the city would have been immune from such an action in tort.

In his complaint the plaintiff alleged that he was injured while loading a truck of his employer parked on the sidewalk; that a truck of the defendant city was parked behind the truck which the plaintiff was loading and close to it; that thereupon the truck of Morrall Furniture Company was driven around the corner, struck the city truck, drove it for-

11. 236 S. C. 601, 115 S. E. 2d 286 (1960).

ward, and the plaintiff was caught between the city truck and his employer's truck.

The particular portion of the statute under consideration here reads:

> No recovery may be had hereunder if the Plaintiff has brought about such injury, death or damage by his negligence or negligently or carelessly contributed thereto, or if such Plaintiff's injury or damage was *brought about by contributory negligence of any third person* . . . (Emphasis added.)

The plaintiff's complaint had denied any "contributory negligence" on the part of a third person but had alleged the "joint and concurrent negligence" of the defendants, Morrall and the city of Beaufort.

The defendant city demurred on the grounds that the complaint failed to allege a cause of action against it because it alleged that the plaintiff's injury was brought about by the contributory negligence of third persons, to-wit: Morrall. The lower court overruled the demurrer apparently differentiating between "contributory negligence of any third person" as used in the statute and "joint and concurrent negligence" of a third party and the city as alleged in the complaint.

The respondents sought to sustain the lower court by the generally accepted definition of "contributory negligence" as the negligence of a *plaintiff* contributing to his injury as an approximate cause without which the injury would not have occurred.

The Supreme Court, however, in reversing the lower court and sustaining the city's demurrer said that the term "contributory negligence" as used in the statute does not have the meaning attributed to it by the respondent, but it clearly means the negligence of a *third person* contributing to the injury, an intrepretation which the context of the statute clearly justifies. The effect of this decision is to interpret the statute in question as making a municipality liable thereunder only when its negligence is the *sole* cause of a plaintiff's injury.

Annexation Decisions

Two decisions handed down during the period under review consider the proceedings for enlarging the corporate limits of a municipality.

The case of *Williams v. Jacobs*[12] considered the proceedings of an election held for the purpose of annexing the town of Ebenezer to the town of York. The action was brought by certain citizens and taxpayers of the town of Ebenezer to have the proceedings declared null and void. The plaintiffs' first contention, that the statute does not authorize the annexation of an incorporated town, was quickly resolved against the plaintiffs under the authority of *Town of Forest Acres v. Seigler.*[13]

However, the plaintiffs' objections relating to the validity of the petition requesting the election in the town of Ebenezer were sustained and the annexation was declared null and void by the Supreme Court.

The particular Code Section upon which the plaintiffs' relied is Section 47-12 of the 1952 SOUTH CAROLINA CODE OF LAWS, which provides:

> To effect any such extension a petition shall first be submitted to the Council by a majority of the freeholders of the territory which it is proposed to annex, accompanied by an adequate description thereof, praying that an election be ordered to see if such territory shall be included in the city or town.

Apparently there were 307 freeholders in the town of Ebenezer; consequently, 154 freeholders' signatures were required upon the annexation petition called for Section 47-12. The lower court found that there were 161 valid signatures to the petition.

The signatures considered by the Supreme Court fell into the following groups: (a) Eight married couples owned property jointly and were counted by the lower Court as sixteen freeholders; the petitions were signed "Mr. and Mrs." by either the husband or the wife. The signatures were ratified by both husband and wife after commencement of this action contesting the validity of the proceedings; (b) Eight married couples owned property jointly and were counted by the lower court as sixteen freeholders; the petition was signed only by the husband or the wife, and only the name of the husband or the wife appeared thereon; however, both husband and wife ratified the same after the commencement of the

12. 237 S. C. 183, 116 S. E. 2d 157 (1960).
13. 224 S. C. 166, 77 S. E. 2d 900 (1953).

said action; (c) The title to the property was in the name of the husband or wife, but the other spouse signed the petition which was subsequently ratified by signature of the owner; (d) The property was owned by the husband, the wife signed his name to the petition, and the husband subsequently ratified the action of the wife in signing the husband's name after the commencement of the said action.

The question before the Court was the validity of the ratification of signatures to the petition. The defendants sought to sustain the ratifications upon the principle of agency whereby ratification of an unauthorized act relates back to the time that the act was done and makes it effective from that time.

The opinion by Justice Taylor, however, incisively strikes down this contention stressing the fact that in this case there was no obligation attaching to those signing the petition, therefore, there was no obligation which could be subsequently ratified. The Court pointed out that in this case what was actually involved was a responsibility to give the matter at hand due consideration for the sake of the other residents and owners in the area affected. The Court, therefore, held the attempted ratifications invalid and the petition accordingly insufficient.

Implicit in the Court's holding on this point is recognition of the fact that a husband or wife when subsequently called upon to ratify an act of his or her spouse after the petition was filed would be likely to be less influenced by a sense of responsibility for the other residents of the area affected than he or she would be if originally presented with the petition for signature before filing. Furthermore, the opinion expressly recognizes the practical difficulty of investigating the authority by which the names which are not the signatures of freeholders are affixed to a petition.

Applying the same principle, the Court upheld the lower court's refusal to add sixteen tenants in common representing four estates all of whom had ratified the signatures of the four initial freeholders.

The action in *Tovey v. The City of Charleston*,[14] was brought to invalidate the annexation proceedings by which

14. 237 S. C. 475, 117 S. E. 2d 872 (1961).

the boundaries of the city of Charleston were enlarged for the first time since 1849. The annexed portions did not lie within or include any municipality as in the *Jacobs* case but the annexed areas were parts of St. Andrews Public Service District. The plaintiffs first contended that St. Andrews Public Service District is a municipal corporation within the meaning of the annexation statute, therefore, no part of it could be attached to another municipality without submitting the question to all the voters in the district. St. Andrews Parish had actually been cut into six separate areas for the purpose of voting on the question of annexation. In four of these areas the result was unfavorable and in two of the areas (Areas A and C) the vote was favorable. The question of annexation was obviously not submitted to the voters of the entire district.

The Court recognized that special purpose districts created by statute have been referred to in some of our cases as municipal corporations, have been held to be municipal corporations within the meaning of certain sections of our Constitution, and perform functions usually performed by incorporated towns and cities. However, it concluded that special purpose districts are not to be regarded as municipal corporations so as to bring them within all of our statutes and constitutional provisions pertaining to incorporated cities or towns because it was clear from the wording of the Sections 47-11, 47-23, and 47-24, that the term "municipality," as used therein applies only to incorporated cities or towns. Accordingly, the Court held that inasmuch as St. Andrews Public Service District was not an incorporated city or town within the meaning of the annexation statute, it was not necessary to follow the procedure where the corporate limits of a city or town are reduced, requiring a vote of all the voters in the city or town being reduced.

The plaintiffs next contended that even if the St. Andrews Public Service District is not a municipal corporation within the meaning of the annexation statute, it is a corporate territory organized by an Act of the General Assembly whose area cannot be reduced or boundaries changed by annexation of a part of it to an adjoining city or town. The Court held, however, under the authority of *Wagener v. Smith,*[15] that the fact that the legislature created a special purpose district

15. 221 S. C. 438, 71 S. E. 2d 1 (1952).

neither prevented the inhabitants of the district from thereafter incorporating, nor prohibited them from taking steps to annex the district or part of it to an adjoining city or town. In the *Wagener* case the Court had held that the General Assembly, which had by legislative enactment established a township form of government for Folly Island, could not thereby deny the formation of towns thereon because that action would destroy the generality of the laws relating to the organization of municipal corporations. The holding on this point in the case under review seems to follow logically from the holding in the *Wagener* case.

Then the plaintiffs contended that the annexation should be voided because the city of Charleston had apparently initiated and partly financed circulation of the petition by the freeholders asking that an election be held on the question of annexation. The Court summarily dismissed this objection stating that there was nothing in the statute prohibiting such activities.

Also, the plaintiffs contended that the annexation was void because the annexed area included 321 acres of marshland owned by the State of South Carolina. This contention likewise was disposed of by the Court in short order with the statement that "the fact that it may be owned by the State would not prevent its annexation to the City of Charleston."

Plaintiffs' last two arguments, dealing with the shape and location of the annexed area, raise the most interesting questions of the appeal.

There is no doubt that the city as enlarged by the annexed area has an extraordinarily irregular shape, and the plaintiffs unsuccessfully asserted this as a ground for voiding the annexation. The Court noted that the boundaries of Charleston by virtue of its location between two rivers have always been irregular. Furthermore, it stated that the annexed area lying across the Ashley River was readily accessible to the old city and that there was no evidence that the annexation would cause any difficulties in the administration of the affairs of the city or result in any undue hardship to any citizen.

> There is no limitation in our annexation statute as to the extent or shape of the territory which may be annexed

> and there is nothing from which any such limitation may be implied. . . . [M]ere irregularity in shape furnishes no justification for interference by the Courts in the determination by the voters that an annexation is to the best interest of both the municipality and the area to be annexed.

The unanswered question which the Court may be faced with in the future is whether the holding in this case is broad enough to permit the exclusion in an annexation of isolated islands to be excluded from and completely surrounded by the town as enlarged.

Finally, the plaintiffs urged that the annexation should be voided because the territory annexed was not "adjacent territory" within the meaning of the annexation statute. This last objection was urged on two grounds. First it was contended that contiguity between the old city and the annexed area (A) was broken by the Ashley River. The Court found that this was no objection inasmuch as the old boundary of the city of Charleston extended to the center line of the Ashley River and the annexation plats showed that the area to be annexed likewise extended to the center line of the Ashley River. The Court pointed out that the river was spanned by an excellent bridge and there was no practical difficulty in making the two areas part of one city. Secondly, it was contended that area (C) was not contiguous because it was separated from the city by area (A) and that, therefore, annexation proceedings for area (C) could not be lawfully commenced until after area (A) had become a part of the municipality. The Court noted that if the election relative to the annexation of area (A) had been unfavorable, area (C) would have not been annexed because there would have been a lack of contiguity between it and the city; but that both elections resulted favorably and the two areas were simultaneously declared parts of the city of Charleston and that there was never a moment of time when there was lack of contiguity between the city and the entire area which was annexed. The Court, therefore, did not sustain this objection and stated as the rule to be followed, "It is sufficient if at the time such areas are annexed, all are contiguous to each other, and one of them is contiguous to or adjoins the City."

Compensation For Private Water Lines Taken Over By A Public Service District

The case of *Derby Heights, Inc., v. Gantt Water and Sewer Dist.*[16] concerns the right of the owners of water lines to be compensated when they are taken over by a Public Service District having the power of eminent domain.

In this case the plaintiffs, a number of real estate developers, had installed water distribution systems in property being developed by them and which was subsequently included in the Gantt Water and Sewer District created by the General Assembly in 1954. After its creation the district took over the operation and maintenance of the water lines and collected a charge therefor.

The developers brought this action against the district to recover just compensation for the alleged taking of their water lines. The district took the position that the developers (1) had actually or by implication dedicated the water lines to the public and (2) had recovered the cost of the same in the consideration received for lots sold in the development.

The Court concluded from the record that there had been no dedication of the water lines to the use of the public emphasizing a letter from the district to one of the developers in 1955 referring to "the private water line now serving your development." This point will more properly be discussed under the survey of property law.

The Court held that the fact that the developers may have been compensated for their water lines did not affect their property interests therein for which they could demand just compensation from the district. The Court found no merit in the district's contention that its merely using the water lines as they had been used by the developers constituted no "taking" for which compensation must be paid. The record showed that the district imposed and collected a charge.

Apparently the several water lines under consideration were constructed at the cost of approximately $79,000.00. The issue presented to the Court was, in effect, who was to get the benefit of this cost — the district's taxpayers, including those lot owners to whom the developers were already ob-

16. 237 S. C. 144, 116 S. E. 2d 13 (1960).

ligated to provide water, or the developers. Under the circumstances, it appears that it would be something of a windfall in either event. The developers had undoubtedly included the cost of this construction in their development costs and had priced their lots accordingly and the lots which remained unsold would probably continue to benefit from the installation of the lines irrespective of the ownership of the lines. On the other hand if the district acquired the lines, it thereby was relieved of the cost of installing them which it would otherwise have had to incur. The Court in upholding the award to the property owners took a strong position behind the right of private property. However, it refused to recognize any property rights in the parties who had purchased lots and thereby acquired a contractural right to have the developers maintain the lines. These persons apparently will pay again through district taxes for the water lines serving them.

It is important to note the limit of the holding in this case. This decision does not establish as a principle of law that a developer can recover the cost of installing the water system which is subsequently taken over by the public. This decision merely holds that the developer by providing water lines for his real estate development does not thereby dedicate these lines to the public nor divest himself of property rights therein. The *value* of these property rights in any given case was not before the Court in this case because it had apparently been agreed upon by the parties as the original cost of installation to the developers. In many such cases, however, it seems that the question would arise as to the measure of compensation to be paid the developer. Under the general rule, just compensation is the market value of the property condemned at the time of taking. However, it is equally as well decided that it is the value of the condemned property to the condemnee and not the value of the condemned property to the condemnor which is controlling. It is difficult in a case like this to see how the value of the pipes to the condemnee would approach the cost of installation. While the pipes themselves undoubtedly have value, in all probability the cost of removing them from the ground would be as great or greater than their intrinsic value. Therefore, it seems that in such a case where the developer is under no obligation to provide substitute lines, the value to the developer owner is

reflected by the net receipts that he anticipates from tap in fees, etc. This very interesting question, whether the compensation will be determined by the market value of the property condemned or whether it will be determined by the value of the condemned property to the condemnee,[17] is left for a future decision.

Right To Enforce Zoning Ordinance

In the case of *Aughtry v. Farrell*[18] the plaintiffs, who owned homes in an A-1 residential zone in the city of Greenville, brought a suit to enjoin the defendants from maintaining and operating a laundry and dry cleaning pick-up business from a building constructed on a portion of the lot where the defendants resided, and also to require the removal of the building. It appears that the building had been constructed after the Greenville Board of Adjustment had granted the defendants a variance and that this variance was subsequently set aside and held to be illegal. After the variance had been set aside the plaintiffs brought this action for injunctive relief.

The lower court dismissed the complaint holding that the plaintiffs were without authority to maintain the action in that they were able to show only general damages and not such special damages as would justify equitable relief; further, that the plaintiffs were denied relief under the theory of estoppel and laches.

It appears that the plaintiffs owned homes in and lived in an A-1 single family dwelling residential zone under the Greenville City Ordinances and in the same zone wherein the defendants constructed the building in question. Apparently none of the plaintiffs owned or lived in homes next to the property on which the defendants' building was located. However, the uncontradicted testimony was to the effect that the value of the property in the immediate neighborhood would be affected to the extent of several blocks. The Court cited its opinion in *Momeier v. John McAllister, Inc.*[19] as establishing the rule that depreciation in value of a person's property is enough alone to constitute him as a "specially damaged plaintiff" in order to bring a suit of this sort. On

17. ORGEL, VALUATION UNDER EMINENT DOMAIN § 42 (2d ed. 1953).
18. 237 S. C. 604, 118 S. E. 2d 569 (1961).
19. 203 S. C. 353, 27 S. E. 2d 504 (1943).

the basis of the evidence it concluded that the plaintiffs would suffer a material impairment in the money value of their property if the complained-of-use should be continued and that their damages are not such as are suffered by the public generally but such damages as are peculiar to those in the immediate vicinity and that the plaintiffs in this case were, therefore, "specially damaged plaintiffs."

The Supreme Court also refused to sustain the defense of estoppel and laches. The opinion pointed out that the defendants knew from the beginning that they were seeking to construct a building and maintain a business in an A-1 residential zone and that their efforts to break the zone boundary were being opposed, both by word of mouth of the neighbors who complained personally and also by action in the court which was commenced on July 16, 1957 (construction had been commenced some time subsequent to March 28, 1957).

The Court's holding on the point of the plaintiff's capacity as a specially damaged plaintiff to maintain this action has, in addition to the legal precedent cited, a sound practical aspect in that it appears in the instant case that if the plaintiffs had not sought to enforce the Zoning Ordinances, the defendants would have been able to continue their violation of the zoning ordinances without molestation.