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EMINENT DOMAIN — COMPENSATION UPON EXTINGUISHMENT OF RESTRICTIVE COVENANTS BY PUBLIC AUTHORITY

In *School District No. 3* v. *Country Club of Charleston*,[1] an appeal by the Country Club of Charleston arising out of condemnation proceedings, the court thus well stated the issue: "The question of whether restrictive covenants confer upon the dominant estate property rights which are compensable for their taking in condemnation proceedings apparently has not heretofore been presented to this Court. There is an irreconcilable conflict in decisions from other jurisdictions as to whether a right to enforce such restrictions constitutes property in the constitutional sense for which compensation must be paid if taken."

It was decided ". . . that a restrictive covenant constitutes such property right that recovery may be allowed for the taking provided damage is established . . . which upon the record before us entitles Appellant to nominal damages only." Nor was appellant entitled to compensation for the loss of its private easement in two roadways encompassed within the land taken in the absence of testimony as to damages sustained by reason of the taking.

EXTINGUISHMENT OF PRIVATE EASEMENT OF WAY BY ABANDONMENT

In *Hodge* v. *Manning*,[2] an involved factual situation posed problems in the extinguishment of a private easement of way. In the discussion which follows the facts have been simplified.

A recorded subdivision plat of farmlands showed a "proposed" unopened road extending ten feet on each side of the boundary line between certain tracts shown on the plat. In 1917 one Knox, predecessor in title of plaintiff and defendant, purchased tract No. 11, on which was situate one-half the width of the portion of the proposed road, and built a barn in the road area, blocking any passage over it. In 1921 Knox acquired tract No. 12, on which

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1. 241 S.C. 215, 127 S.E.2d 625 (1962). This case also noted in Public Corporation section at note 20.
2. 241 S.C. 142, 127 S.E.2d 341 (1962).

was situate the other one-half in width of the proposed road. From 1921 until 1946 Knox occupied and used both tracts as one parcel. While the "proposed road" had been opened as a public road in the area south of tracts Nos. 11 and 12, Knox fenced across the road at his southern boundary, with only a private driveway (barred by a locked gate at night) leading from the public road onto his land. The road was never opened north of tract Nos. 11 and 12, and after preparation of the plat in question the tracts to the north became ". . . part of a larger residential subdivision, apparently with access to roads to the north." In 1946 Knox sold tract No. 12 to the defendant, and the plaintiff acquired tract No. 11 after the death of Knox in 1960.[3] The instant suit for damages and injunctive relief resulted from defendant's erection of a fence to bar plaintiff's use of the proposed road.

On appead, the lower court's holding that plaintiff had an easement for the use of the proposed road as shown on the plat was reversed. The court recognized the basis of plaintiff's claim of easement as ". . . the well-settled principle of law that, where property is sold and described with reference to a plat or map upon which streets and ways are shown, an easement therein is implied in favor of the grantee."[4] Since no question had been raised relative to the designation as a "*proposed* road" (emphasis added), the court ". . . assume[d] . . . that such designation on the plat and references thereto in a subsequent conveyance gave rise to an implied easement for the use of the strip as a roadway."

While the portion of the road lying south of the lands of plaintiff and defendant had been opened to the public, the por-

3. The court found that references to the proposed road in the conveyances to plaintiff and to defendant ". . . did not show an intent to create any new rights but only referred to such rights as arose by virtue of the designation on the 1916 plat of such road." The opinion further noted that "[i]f Mr. Knox abandoned the easement, it could only be revived by a new grant."

4. As supporting authority the opinion cites Billings v. McDaniel, 217 S.C. 261, 60 S.E.2d 592 (1950). In *Billings*, the court had quoted Cook v. Totten, 49 W.Va. 177, 38 S.E. 491, 492 (1901), to the effect that such grantee ". . . is entitled to the use of all the streets and ways, near or remote, as laid down on the plat by which he purchases." For further comment on the extent of the easement thus acquired, see Cason v. Gibson, 217 S.C. 500, 508, 61 S.E.2d 58 (1950). See also Kemmerlin, *What Constitutes Intent to Dedicate in South Carolina*, 6 S.C.L.Q. 96 (1953).

In the instant case the opinion makes no mention of the possible interest of purchasers of the other tracts as shown on the 1916 plat, nor were their claims in issue, they not being parties to the suit, either individually or as members of a class. However, the facts would indicate that any easements in defendant's land in favor of the purchasers of other tracts had long since been extinguished by adverse possession. See Outlaw v. Moise, 222 S.C. 24, 29, 71 S.E.2d 509 (1952), and the cases there cited.

tion between the property of plaintiff and defendant, as well as north thereof, had never been so opened, nor had there been an express or implied acceptance thereof, ". . . either by acts of the public or by general public use. Without such acceptance any proposed dedication of the road to public use would not be complete." [Citing *Outlaw* v. *Moise.*[5]] Nor did the driveway into the property of Knox, which was used by persons visiting his home for social and business purposes, become a public road by reason of such use.

Plaintiff, as successor in title of Knox, had no claim to a private easement in the proposed road because all claim to the easement had been abandoned by Knox. "When Mr. Knox constructed his barn across the proposed road, allowing it to remain for a period of approximately 43 years, and erected fences across and down the center of a great portion of the strip, he was putting it to a use utterly inconsistent with the right to use it as a roadway. The long continued use of the proposed road for purposes inconsistent with its use as a roadway clearly manifested an intent to abandon the easement."

In a concurring opinion, Justice Brailsford soundly noted that the decision might also be justified on the theory of the extinguishment of an easement by merger, citing *Pearce* v. *McClenaghan.*[6]

GROCERY SUPERMARKET AS PRIVATE NUISANCE

Two cases[7] involving supermarkets as alleged private nuisances were decided during the survey period. The first, *Strong* v. *Winn Dixie Stores, Inc.*,[8] would seem to represent a commendable recognition of the unwisdom of judicial, as opposed to legislative, zoning of a municipality's land use.[9]

In *Strong*, the suit, one for permanent injunction against the proposed construction and operation of a grocery supermarket

5. 222 S.C. 24, 29, 71 S.E.2d 509 (1952).
6. 5 Rich. 178, 187 (S.C. 1851).
7. Strong v. Winn Dixie Stores, Inc., 240 S.C. 244, 125 S.E.2d 628 (1962); Winget v. Winn Dixie Stores, Inc., 242 S.C. 152, 130 S.E.2d 363 (1963). This case also noted in the Torts Article at note 13.
8. *Supra,* note 7.
9. In discussing "the inherent weakness of the law of nuisance," Professor Cribbet comments: "[I]t is really a kind of judicial zoning but carried out on a sporadic, hit-or-miss basis. While the law of nuisance has had a distinguished past as a regulator of land use, in the days when life was less complex, it would appear to be of diminishing importance as legislative control by zoning takes over from the judiciary." CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 292 (1962).

in the town of York, was brought by the owners of nearby residential property. The proposed construction was not in violation of any restrictive covenant or zoning ordinance, and the theory of plaintiffs' suit was that of private nuisance. A prior appeal had held the complaint good against demurrer and technically, at least, the issue on the instant appeal was the sufficiency of the record to sustain concurrent fact findings by referee and trial judge that the proposed operation as alleged in the complaint would constitute a nuisance.

By a divided court (3-2) a decree granting injunctive relief was reversed. While conceding that the area involved was predominantly residential in character, the court noted its location immediately adjacent to the main business section of York and the fact that commercial enterprises had encroached into the block in question. The operation of a retail grocery is a lawful business, and while a court of equity may enjoin a threatened or anticipated nuisance upon a proper showing, ". . . equity will not interfere where the anticipated nuisance is doubtful, contingent or conjectural . . . . The evidence must show that a nuisance is inevitable from the proposed use of the premises or will necessarily result."

The increased traffic, noise and fumes incident thereto which would result from defendant's proposed operations afforded no basis for injunctive relief, in view of the close proximity of plaintiffs' residences to an existing commercial area. "No one is entitled to absolute quiet in the enjoyment of his property; he may only insist upon a degree of comfort prevailing in the locality in which he dwells. The location and surroundings must be considered, since noise which amounts to a nuisance in one locality may be entirely proper in another."[10]

Nor would the fact that plaintiff's property might be depreciated in value warrant the grant of injunctive relief. "A use of property which does not create a nuisance cannot be enjoined or a lawful structure abated merely because it renders neighboring property less valuable."[11]

Contentions that defendant's operations would bring into the neighborhood trash and unsanitary conditions were non availing, as was the argument that outside lights in the parking area might

10. Quoting 39 AM. JUR. *Nuisance* § 47 (1942). (See pp. 332 and 333).
11. Quoting 66 C.J.S. *Nuisances* § 19 d (1950). (See p. 771.)

result in objectionable glare. Such consequences were not inevitable, and if they occurred, relief should then be sought.

The assigned basis of the decision was that "[t]he facts of this case afford no reasonable basis for the conclusion reached by the lower Court that the proposed operation of the supermarket will necessarily or inevitably result in a nuisance. If such does result from the operation of the business, appropriate remedy will be available to the plaintiffs at that time." Of critical importance, however, would seem the following expression of policy: "The effect of the decision of the lower Court will be to stifle all growth of the business area of the community. * * * * The extent of a business area in the town and its location are matters which cannot be controlled by judicial decision. The regulation of such matters is normally reserved under the police power to the legislative branches of local and state government. The Court has no power to zone property."

Not without logic, the minority argued that the propriety of judicial zoning in the instant case had been determined on the prior appeal, and that the sole issue on the present appeal was the sufficiency of the record to support the concurrent findings of fact by referee and circuit judge. In the opinion of the dissenting justices, those findings ". . . were neither lacking in evidentiary support nor contrary to the clear preponderance of the evidence."

In the second case, *Wingate* v. *Winn Dixie Stores*,[12] plaintiffs, owners of a residence adjacent to the defendant's supermarket in Sumter, sued for damages allegedly sustained by reason of the store's location and operation in such a manner as to constitute a nuisance, and for an order permanently enjoining the defendant from using its property for a retail grocery store or for any other business purpose. While plaintiff's home was in an area zoned for residences, defendant's store was in an area zoned for the use being made.

The trial resulted in entry of judgment on a verdict for plaintiff in amount $5,000 dollars, but the trial judge denied injunctive relief. On appeal the case was reversed and remanded for a new trial.

The court agreed with the circuit judge that there could be no recovery on the theory that the supermarket was a nuisance because of its location. "The business of the defendants is a lawful

12. *Supra*, note 7.

one and was located in an area which had been zoned . . . for retail business and at a location which the zoning board determined to be suitable for a retail grocery. The record shows that every requirement of the municipal authorities was met in establishing the business in question, both in the location and the construction of the building. There is no evidence that the building was constructed in such manner as to interfere with the rights of others. Under such circumstances it cannot be held that the location of the business in the area in question constituted a nuisance."

However, "[t]he fact . . . that one has been issued a license or permit to conduct a business at a particular location cannot protect the licensee who operates the business in such a manner as to constitute a nuisance."

Considering the record, the court found that neither "the normal traffic and noise caused by containers going to and from the supermarket" nor the "usual and normal operations of the city in removing trash and garbage" in the surrounding area constituted a nuisance.

However, there was testimony that at an earlier time, though now largely discontinued, defendant's air-conditioning fans had blown against the trees and shrubbery on plaintiff's property; that defendant's floodlights cast a glare over plaintiff's property until late at night; that odors were created from the garbage accumulated at defendant's store; and that paper and trash from this garbage was permitted to escape onto plaintiff's lot. Such testimony made a jury issue and defendant's motion for a directed verdict therefore was properly refused.

Nor would the fact that there was no appeal from the refusal of injunctive relief preclude the plaintiffs. "Where the acts complained of as constituting a nuisance have been discontinued and their repetition appeared unlikely, it was proper to refuse to issue an injunction." This, however, would not affect plaintiff's right to recover damages for past acts of the defendants.

Discussion of certain evidentiary and procedural matters is ommitted.

TIME OF DETERMINATION OF TESTATOR'S HEIRS

In *White* v. *White*,[13] a suit to construe a will, the limitations in issue read: "Item IV. All the rest and residue of my real

13. 241 S.C. 181, 127 S.E.2d 627 (1962).

estate I give, devise, and bequeath to my wife, Victoria Hunt, for and during her natural life and at her death to my lawful heirs, *per stirpes*, under the Statutes of Distribution of South Carolina."

. . .

"Item VIII. All the rest and residue of my personal property I give and bequeath to my wife, Victoria Hunt, for her life and at her death, *per stirpes*, to my lawful heirs under the Statutes of Distribution of South Carolina."

The testator was survived by his widow, five brothers and sisters, and the issue of three deceased brothers and sisters. The widow outlived her husband by more than 37 years, and at her death, the issue, as stated by the court, was ". . . whether the interest of the 'lawful heirs' of the testator are to be determined at the death of the testator and, if so, whether testator's widow is included in the term 'lawful heirs'."

It was held that the heirs were determinable at the death of the testator, and that the widow was included in the expression "my lawful heirs, *per stirpes*, under the Statutes of Distribution of South Carolina."

In reaching its conclusion, the court relied on the preference for the early vesting of estates, and upon "[t]he well recognized rule . . . that when there is a devise to 'heirs' as a class, they take at the death of the testator, unless a different time is fixed by the word 'surviving,' or some other equivalent expression."

The phrase "at her death" was not found to postpone the time of determination of the heirs, but merely to fix the time when the remaindermen were entitled to possession. Nor did the fact that the life tenant was a member of the class to whom the remainder was given postpone the time of vesting.

Finally, the term "*per stirpes*" was construed to relate to the mode of distribution rather than being intended to limit "heirs" to "blood relatives" to the exclusion of the widow.

The decision accords with the weight of the earlier South Carolina cases.

TRESPASS TO TRY TITLE

Marsh Plywood Corp. v. *Graham*,[14] an action between adjoining land owners to determine ownership of land in dispute, was

14. 240 S.C. 485, 126 S.E.2d 510 (1962).

decided on the principle ". . . that, insofar as record title is concerned, where both parties claim under a common source, the elder or better title will prevail." The court found the action to be one in the nature of trespass to try title, wherein ". . . the plaintiff must recover, if at all, on the strength of his own title." As the record raised no issue of adverse possession, the defendant was entitled "since [he] has shown the senior and better title to the land in question from the common source and he has the paramount title to the lands."

RULE IN SHELLEY'S CASE

In *Bethea* v. *Bass*,[15] the court, in deciding whether or not the rule in Shelley's Case should be held applicable to a deed executed by mother to son in 1919, once again had the tedious and futile task of sorting and matching the myriad South Carolina precedents one against another.

The granting clause was "unto the said [A] for and during the term of his natural life," and the habendum ". . . unto the said [A], for and during the term of his natural life, and at his death to his issue then living, taking *per stirpes*, to them, their heirs and assigns forever."

"But if he leaves no issue surviving him, then to his brothers and sisters, their heirs and assigns forever." Then followed conditions as to payment of taxes by A, that timber was not to be cut by him, and that annual payments in cotton were to be made by the "grantees" to the grantor for the balance of his life, with provision that upon breach of any condition ". . . this conveyance shall determine and become void and the title . . . shall revert to the grantor and her heirs and they may enter and take possession of same."

After a detailed review of many earlier cases, conceded to be "not altogether harmonious," it was concluded that the son took only a life estate, the court stating: "We think . . . that the restriction of issue to those surviving the life tenant, coupled with the limitation over, rendered the rule in Shelley's Case inapplicable. We affirm the judgment on that ground and therefore need not comment in detail upon the effect of the super added words 'per stirpes, to them their heirs and assigns forever,' or of the requirement that the life tenant may pay taxes, or of the

15. 240 S.C. 398, 126 S.E.2d 354 (1962).

restriction upon the cutting or sale of timber during the life tenant's life and the condition that the 'grantees' deliver to the grantor each year during her life 1980 pounds of cotton. But we agree with the circuit judge that although none of these provisions, standing alone, would require the holding that the word 'issue' was used as one of purchase, they lent support to that conclusion when considered together in connection with the provision for only a life estate to [A] in the granting clause and the restriction of the remainder to his surviving issue in the habendum."

PERSONAL PROPERTY—BAILMENTS

Shoreland Freezers, Inc. v. *Textile Ice & Fuel Co.*,[16] a bailment case, was concerned with a warehouseman's liability for damage to bailed goods as well as with his entitlement to compensation for the storage of goods damaged through his negligence. The trial judge had directed a verdict for the defendant bailee on the ground that there was no evidence that the goods (frozen foods) were sound when delivered. On appeal the case was reversed and remanded for a new trial, the evidence being found sufficient to go to the jury on the issue of delivery of the goods in good condition and their damage in storage due to defendant's negligence. It was further decided that a warehouseman who is made to pay compensation for goods damaged through negligence is nevertheless entitled to storage charges.

LANDLORD AND TENANT

In *Burnett* v. *Boukedes*,[17] a landlord brought claim and delivery against a transferee from the tenant to recover possession of an air-conditioner which had been removed from the leased premises while rent was in arrears, but more than ten days[18] before institution of suit. It was held that the landlord was not entitled to possession, the court saying: "[T]he only way by which a landlord can obtain and perfect a lien for rent on the property of a tenant is by a distress warrant levied on the prop-

16. 241 S.C. 537, 129 S.E.2d 424 (1963).
17. 240 S.C. 144, 125 S.E.2d 10 (1962).
18. Section 41-156 of the 1962 Code provides: "Property removed from premises subject to distress.—Any property belonging to the tenant removed from the premises shall, if found, be subject to distraint and sale, provided such distraint be made within thirty days after such removal." Prior to amendment in 1960 (51 Stat. 1602) the prescribed period was ten days. The facts in the instant case occurred before amendment of the statute.

erty liable for the rent while it is on the leased premises, or within ten days after its removal therefrom. Until a lien is thus obtained, the landlord right thereto is inchoate. Since [plaintiff] did not distrain upon the goods of the tenant while upon the premises, or within ten days after removal of such goods from the premises, his right so to do expired and was lost."

The court further stated "if [defendant] knowingly, or wrongfully and fraudulently removed the air-conditioning unit from the rented premises and, thereafter, concealed same for the purpose of preventing a distress thereon for rent and arrears, then the landlord has a right of action against him for the damages sustained."[19] The opinion expressly reserved the landlord's right to bring such an action.

The case also held that under the pleadings the judgment in favor of the defendant should have been in the alternative for the return of the air-conditioner or its value, and that the judgment entered for its stated value alone was error.

In *Haverty Furniture Co.* v. *Worthy*,[20] it was held that as against a landlord restraining for arrears of rent, actual notice to the landlord of an unrecorded conditional sales contract is as effective as recordation to preserve priority of the conditional vendor's interest.

The court reached its conclusion by reason of the "plain provisions" of section 41-155 which, after according priority to

19. As authority supporting the suggested action for damages the court cited 52 CORP. JUR. SEC. *Landlord and Tenant* §§ 643, 714, and Streetman v. Turner, 32 Ga. App. 733, 124 S.E. 549 (1924). Both § 643 and *Streetman* pertain to enforcement of a landlord's statutory lien rather than the common law of distress. § 714 is concerned with the statute [11] Geo. II c. 19 § 3 (1738), which reads: "And to deter tenants from such fraudulent conveying away their goods and chattels, and others from wilfully aiding or assisting therein, or concealing the same; be it further enacted by the authority aforesaid, That from and after the said twenty fourth day of June, if any such tenant or lessee shall fraudulently remove and convey away his or her goods or chattels as aforesaid, or if any person or persons shall wilfully and knowingly aid or assist any such tenants or lessee in such fraudulent conveying away or carrying off of any part of his or her goods or chattels, or in concealing the same; all and every person or persons so offending shall forfeit and pay to the landlord or landlords, lessor or lessors, from whose estate such goods and chattels were fraudulently carried off as aforesaid, double the value of the goods by him, her, or them respectively carried off or concealed as aforesaid; to be recovered by action of debt in any of his Majesty's courts or record at Westminster, or in the courts of session in the counties palatine of Chester, Lancaster, or Durham respectively, or in the courts of grand sessions in Wales; wherein no essoin, protection, or wager of law shall be allowed, nor more than one imparlance."

The applicability in South Carolina of § 3 of the statute is doubtful. See Rogers v. Brown, 1 Speers 283 (S.C. 1843).

20. 241 S.C. 369, 128 S.E.2d 707 (1962). This case is also noted in the Commercial Transaction section at note 29 and in the Pleading section at note 9.

recorded chattel mortgages, then provides: "And if the landlord had actual notice of any unpaid purchase money lien, such lien shall have priority to his claim for rent in the same manner as above provided for certain chattel mortgages." The opinion does not make clear whether an unrecorded lien for other than purchase money would likewise be protected.

CASES OMITTED

Dozier v. *Able*[21] involved determination of the persons included within a testamentary gift "unto all of my first cousins . . . and in case of the death of any of the said devisees, before my death, . . . the child or children of such deceased devisee to take the portion the parent would have taken if living at my death." The court held that the children of first cousins who had died prior to the making of the will were not entitled to participate. The case is discussed in detail in the survey of Wills.

Britton v. *Amos*,[22] an action to have a deed absolute on its face declared a mortgage and to recover damages for the wrongful cutting of timber on the conveyed land, is discussed in the survey of Security Transactions.

LEGISLATION

Amendment of the Motor Vehicle Title Law.

Discussion of the 1963 Amendment to the Motor Vehicle Title Law[23] will be found in Commercial Transactions.

LIABILITY OF INNKEEPER FOR LOSS OF PERSONAL PROPERTY OF A GUEST

The statute[24] affecting the liability of an innkeeper for loss of the personal property of a guest was amended[25] to further limit such liability by prescribing a monetary limit of recovery.

21. 241 S.C. 358, 128 S.E.2d 682 (1963).
22. 241 S.C. 336, 128 S.E.2d 161 (1962). This case is also noted in the Security Transaction section at note 1.
23. Act No. 151, 53 Stat. 161 (1963) amending S. C. Code § 46-150.13 (1962).
24. S.C. Code § 35-4 (1962).
25. Act No. 244, 52 Stat. 278 (1963).