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EDENS: THE PRIME OBSTACLE TO A REDEVELOPMENT OF SOUTH CAROLINA WATER LAW

I. Introduction

One of the largest obstacles to any sweeping revision of South Carolina's present riparian rights approach to water regulation is the present very conservative South Carolina law in the field of eminent domain. The purpose of this study is to outline South Carolina's position and discuss its relation to the possibility of a switch from riparian rights to some form of prior appropriation.

II. The Problem

For over fifteen years there has been interest expressed in South Carolina in a complete revamping of this state's approach to water and water rights legislation.[1] Since the concept of riparian rights, South Carolina's current approach to this area, involves the notion of private ownership of a water right,[2] any change to an appropriation system would involve a reallocation of these water rights and thus, it could be argued, a "taking" by the state of a private property right for which compensation would be required,[3] if indeed the plan were constitutional at all. The problem becomes a two-pronged one. First, South Carolina case law makes a very marked distinction between an exercise of the power of eminent domain and an exercise of the police power.[4] Generally, the court prefers to restrict the use of police power so that the change to appropriation would probably be viewed as an exercise of eminent domain with its resulting requirement of compensation.[5] If this is true, the second problem

1. *See Special Issue on Water Law*, 5A S.C.L.Q. 103 (1952).

2. Rice Hope Plantation v. South Carolina Public Service Auth., 216 S.C. 500, 522-24, 59 S.E.2d 132, 141-42 (1950), although *Rice Hope* did involve state flooding, and thus a taking of other property rights, it was also held in this case that a destruction of plaintiff's riparian rights in streams and in other waters which were on his property was compensible under eminent domain principles.

3. S.C. Const. art. I, § 17 provides in part:
> Private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first make therefor.

4. Edens v. City of Columbia, 228 S.C. 563, 571, 91 S.E.2d 280, 282 (1956); Richards v. City of Columbia, 227 S.C. 538, 547-52, 88 S.E.2d 683, 687-89 (1955).

5. The reason for this opinion will be discussed in detail in section III *infra*.

is that South Carolina has a very narrow view of what constitutes a public use for which the eminent domain power can be constitutionally invoked.[6]

III. EDENS: ANCESTORS AND PROGENY

A. Ancestors

Edens v. City of Columbia[7] is *the* example of the kind of havoc the South Carolina court could well play with even the most carefully drawn statutory scheme for redevelopment and reallocation of existing property rights. In 1946, the South Carolina General Assembly inaugurated a progressive urban redevelopment program with its enactment of the Redevelopment Law.[8] The idea behind this statute was that many cities or counties with slum or incipient slum areas would set up Housing Authorities to prepare redevelopment programs. To implement the plan, the Authority would have the power to acquire property by eminent domain, raze it, and make it available to either public or private interests by sale for housing, industrial, or recreational redevelopment in accordance with the predetermined plan. The Authority could acquire federal, state, and local funds by bond, tax, loan, or contribution in furtherance of its purposes.[9]

Eventually, all fifty states and the District of Columbia adopted statutes like this one. In 1954, the United States Supreme Court was asked to rule on the constitutionality of the District's redevelopment law in the case of *Berman v. Parker*.[10] The controversy in *Berman* centered on a definition of what constituted a "public use" such as would support an exercise of the power of eminent domain. The property owners argued that the project took from one businessman for the benefit of another. The Supreme Court countered with a very expansive definition of "public use":

> Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. Once the object is within

6. *Edens*, discussed *infra*, is the main authority for this statement.
7. 228 S.C. 563, 91 S.E.2d 280 (1956).
8. XLIV S.C. STATS. AT LARGE 1450 (No. 531, 1946), later S.C. CODE ANN. §§ 36-401—414 (1952) [declared unconstitutional in *Eden v. City of Columbia*, 228 S.C. 563, 91 S.E.2d 280 (1956)].
9. *See*, Morris, *The Quiet Revolution: Eminent Domain and Urban Redevelopment*, 52 A.B.A.J. 355 (1966).
10. 348 U.S. 26 (1954).

> the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area . . . . [T]he means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. The public end may be as well or better served through an agency of private enterprise than through a department of government—or so Congress might conclude.[11]

The Court made a rather nice distinction by finding that the end, urban rehabilitation, was within the ambit of the police power—public safety, health and the like. Thus, the phrase "public purpose" in an eminent domain statute or constitutional provision would refer to the police power in the Supreme Court's view. Eminent domain itself would be no more than the vehicle of the sovereign's will. But, more subtly, this view is one which equates public purpose with public welfare or benefit.

Most states have used this sort of argument to overrule constitutional challenges to similar statutes. There are only three states which have sustained a constitutional challenge to a redevelopment law of the *Edens-Berman* variety.[12]

The issue in *Edens* was also one of defining "public use." The South Carolina court viewed the argument that eminent domain stems from and is an adjunctive implementor of the police power as an unusual and unsatisfactory one. They pointed to the distinction between compensation in the case of eminent domain and no compensation in the case of an exercise of police power as an indication that the two were somehow different. Striking at the heart of the usual justification for these plans, the court stated:

> Some cases take the very broad view that "public use" is synonomous with "public benefit". A more restricted view, however, would seem better to comport with the

11. *Id.* at 33-34 (citations omitted).
12. *South Carolina*: Edens v. City of Columbia, 228 S.C. 563, 91 S.E.2d 280 (1956); *Georgia*: Housing Authority of Atlanta v. Johnson, 209 Ga. 560, 74 S.E.2d 891 (1953); *Florida*: Adams v. Housing Authority of Daytona Beach, 60 So. 2d 663 (Fla. 1952); noted from Morris, *supra* note 9, at 358 n.16.

> due protection of private property against spoilation under the guise of eminent domain.[13]

The court relied on *Riley v. Charleston Union Station Co.*[14] and *Bookhart v. Central Electric Power Co-op.*[15] in support of this restricted view.

Bookhart is an anomoly in many ways. There it was held that a rural electric co-operative could be classified by the legislature as a public service corporation and thus be given the power of eminent domain. Yet, the case also contains language almost identical to that quoted *supra* at note 13 from *Edens.*[16] This language is also found in the *Riley* decision[17] where it is quoted from the 1883 edition of Judge Cooley's treatise on *Constitutional Limitations.*[18] The 1903 edition of this work updates the "public use" definition contained in the earlier version stating:

> [W]hile there are unquestionably some objections to compelling a citizen to surrender his property to a corporation . . . influenced by motives of private gain and emolument, so that *to them* the purpose of the appropriation is altogether private, yet conceding [the purpose of the plan is] a public necessity, if the *legislature* . . . decide the general benefit is better promoted by their construction through individuals or corporations than by the state itself, it would clearly be pressing a constitutional maxim to an absurd extreme if it were held that the public necessity should only be provided for in a way which is least consistent with the public interest.[19]

Cooley's 1903 statement goes to the heart of the majority American federal and state board "public benefit" view of this question,[20] and yet the 1951 *Bookhart* opinion and the 1956 *Edens* opinion cited Cooley in support of a description of the public benefit theory as "apparently generally abandoned"![21]

13. Edens v. City of Columbia, 228 S.C. 563, 571-72, 91 S.E.2d 280, 282-83 (1956).
14. 71 S.C. 457, 51 S.E. 485 (1905).
15. 219 S.C. 414, 65 S.E.2d 781 (1951).
16. *Id.* at 431, 65 S.E.2d at 788.
17. Riley v. Charleston Union Station Co., 71 S.C. 457, 485-86, 51 S.E. 485, 496 (1905).
18. T. COOLEY, CONSTITUTIONAL LIMITATIONS 654 (5th ed. 1883).
19. T. COOLEY, CONSTITUTIONAL LIMITATIONS 776 (7th ed. 1905).
20. *See,* Berman v. Parker, 348 U.S. 26 (1954) and material cited *supra* at notes 8 & 11.
21. Edens v. City of Columbia, 228 S.C. 563, 572, 91 S.E.2d 280, 283 (1956); Bookhart v. Central Electric Power Co-op., 219 S.C. 414, 431, 65 S.E.2d 781, 788 (1951).

This is the sort of blind adherence to precedent which is sometimes applauded as interesting fodder for the academic, but in the present case it results in a disastrous stultification of legislative attempts to meet and accept the challenge of industrialization in South Carolina.

In writing the Redevelopment Law, the General Assembly had done as Judge Cooley suggested, that is, they set out in the very clearest terms their intention to declare the act a matter of public use or benefit.[22] Yet *Edens* ruled this judgment was ultimately a judicial one. The *Edens* court went on to rule the provision unconstitutional and with it the entire act fell.

B. Edens Progeny

In *Mills Mill v. Hawkins*,[23] the court held, over the objection of property owners who had already built private facilities, that an act creating Una Water District in Spartanburg County was not an unconstitutional taking even though the landowners were given no voice in the formation of the water district. The court accepted the legislature's finding that the public welfare would be served by this legislation. The dissent, citing *Edens*, suggested that this finding was not within the legislative prerogative and argued that the act was unconstitutional.[24] *Eden's* absence from the majority opinion is conspicuous, but the *Mills* case involved a more obvious and accepted public health interest —sewage control—and thus under an *Edens* analysis might be viewed as a police power case. If so, it is no real dilution of the *Edens* holding, yet it is intriguing that *Mills* justified public use by stating that private property values would be enhanced by the formation of the district.[25] But, if *Mills* were viewed as an erosion of *Edens*, the *Mills* court also admits that a prime motivation for their decision was not a desire to challenge that precedent but rather a feeling that the investment of "millions

22. S.C. CODE ANN. § 36-403 (1952) entitled "Legislative Findings" provided in part:

> (4) . . . [T]he elimination of conditions of blight, the acquisition and preparation of land in or necessary to the development of blighted areas and its sale or lease for development or redevlopment in accordance with general plans of communities . . . are public uses and purposes for which public money may be expended and private property acquired . . . .
>
> (5) . . . [T]he necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination.

23. 232 S.C. 515, 103 S.E.2d 14 (1957). *Accord*, Distin v. Bolding, 240 S.C. 545, 126 S.E.2d 649 (1962).

24. *Id.* at 538, 103 S.E.2d at 25 (Legge, J., dissenting).

25. *Id.* at 531, 103 S.E.2d at 21.

of dollars in bonds . . . issued and outstanding"[26] in reliance on the act must be protected.

If *Mills* let in a ray of hope, it was doused the next year by *Collins v. City of Greenville*,[27] in which the misinterpretation of Cooley via *Riley*, *Bookhart*, and *Edens* was reiterated as it was again held that public use and public benefit are not synonymous in South Carolina. The plaintiff in *Collins* unsuccessfully attempted what was finally accomplished in *Kline v. City of Columbia*,[28] that is, he argued that a negligent act of the city which damaged him constituted a taking of property for which he was entitled to compensation. The court denied the argument by using the narrow construction of public use. This is nothing short of legal casuistry. The later *Kline* decision, involving the same degree of injury in this writer's opinion, tried to distinguish *Collins* but effectively overruled it by expanding public use to include what looks very much like a tortious act of the sovereign. Eminent domain was used to afford recovery of actual damages; without it the recovery would have flown directly in the face of South Carolina's very strict sovereign immunity doctrine.[29] It seems strange that the court could apply eminent domain so liberally in a tort situation in which it is so infrequently used in American jurisdictions, and yet refuse a well accepted and much more traditional majority view of eminent domain's application in an area for which it clearly seems designed.

The most recent application of *Edens* is *Young v. Wiggins*,[30] a suit by landowners in the Ebenezer Community Watershed District to enjoin the district's use of the condemnation power granted them by the General Assembly.[31] The use was held constitutionally invalid and again the court cited the *Edens-Riley-Bookhart* language discussed *supra*.[32] The legislature has attempted to cure the constitutional defect by requiring referenda involving all electors in the proposed district,[33] but it would appear that another constitutional challenge

26. *Id.* at 527, 103 S.E.2d at 19.
27. 233 S.C. 506, 105 S.E.2d 704 (1958).
28. 249 S.C. 532, 155 S.E.2d 597 (1967).
29. This writer has expressed the view that *Kline* represents an almost total abrogation of the municipal tort immunity doctrine. *See Property Survey*, 19 S.C.L. REV. 635, 637-40 (1967).
30. 240 S.C. 426, 126 S.E.2d 360 (1962).
31. L S.C. STATS. AT LARGE 2344 (No. 1085, 1958).
32. Young v. Wiggins, 240 S.C. 426, 432-35, 126 S.E.2d 360, 363-65 (1962).
33. LIV S.C. STATS. AT LARGE 106 (No. 82, 1967); LV S.C. STATS. AT LARGE 1158 (No. 613, 1967). The codified sections of these acts are found at S.C. CODE ANN. §§ 63-171—191 (Supp. 1967).

in the manner of *Young* might well be successful since the court in *Young* indicated its opinion that a watershed district was not a public use.[34]

IV. A STATUTORY INCONSISTENCY

South Carolina has a statute governing drainage rights of way which provides for private condemnation of a right of way through another's land in the event drainage is needed and the landowner over whose land the right is sought refuses to grant it.[35] The provisions date back to at least 1881, but there has been no case law ruling on their constitutionality or effect. To distinguish drainage districts, slum clearance for city housing only, and sewerage districts from redevelopment plans involving some private activity on the basis that the former involve police power and the latter eminent domain, so that the former are constitutional and the latter not, seems completely illogical to this writer. It is ironic, to say the least, that a private individual has a power over another's property rights which the state does not!

V. CONCLUSION

With the exception of the provision discussed in section IV *supra*, South Carolina's legislative attempts at creating a larger scope for eminent domain have been of little effect. *Edens* and related opinions have demonstrated clearly that they have the capacity to devastate the most carefully designed restructuring

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34. Young v. Wiggins, 240 S.C. 426, 433-35, 126 S.E.2d 360, 363-65 (1962).
35. S.C. CODE ANN. §§ 18-51 to -76 (1962). Sections 18-51 and 18-52 provide in part:

> *Right to open waterway for drainige.*—Any person owning lands which can only be properly drained through or over lands of other persons through or over which there is no right of way, sufficient waterway or ditch cut may, as hereinafter provided, enter construct and cut a waterway or ditch through and over such lands to the nearest waterway, ditch, stream or outlet then existing.
> *Initiation of proceedings when servient tenant objects.*—If any owner or owners of such surrounding or adjacent lands shall signify his or their refusal to the opening of a sufficient waterway or ditch through such lands without previous compensation the person requiring such waterway or ditch shall give ten days' notice in writing to the person or persons through whose lands such waterway or ditch is required of his *intention to cut, open and establish* such waterway or ditch, naming in such notice a person who will act as referee for him in the location thereof and such owner or owners shall, within ten days thereafter, appoint a referee for the same purpose.

(Emphasis added).

of South Carolina Water Law. The *Kline* and *Mills Mill* decisions provide some justification for thinking that in the future the court will be willing to accept a view of eminent domain as a tool with which to fashion a role for the state government in industrial development.

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