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# Property

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# PROPERTY

## I. ZONING

### A. *Incompatible Uses*

*Niggel v. City of Columbia*[1] deals with the power of the Board of Adjustment to deny a zoning permit, sought by a landowner and approved by the Zoning Administrator, for the construction of a gasoline filling station in a zoning district which expressly includes gasoline filling stations as a permitted use. A major point of contention in this case was whether the nature of the *surrounding* districts was a proper factor for the Board to consider on hearing an appeal from the decision of the Zoning Administrator to grant a zoning permit.

The plaintiffs, Niggel and Hess Realty Corp., relying on a zoning classification of C-4, general commercial, applying to Mrs. Niggel's property, entered into a lease whereby Hess was to construct and operate a gasoline filling station on a portion of Mrs. Niggel's property. A C-4 zoning classification expressly includes gasoline filling stations as a permitted use.[2] Under the Zoning Ordinance of the City of Columbia no building may be constructed unless a zoning permit is first obtained from the Zoning Administrator, whose decisions are subject to appeal to the Board of Adjustment. The decision of the Zoning Administrator to issue the required permit to Hess was appealed; the Board of Adjustment, after a hearing, reversed the decision of the Zoning Administrator and denied the permit. The grounds on which the Board denied the permit were that "the proposed use of the property for a filling station site would be 'incompatible with the district and neighborhood in that such an operation at this location would be potentially dangerous by reason of noise, glare and traffic congestion.'"[3] The circuit court, reviewing the action of the Board of Adjustment under a writ of certiorari, reversed the Board's decision.

On appeal to the South Carolina Supreme Court, the appellant contended that the Board of Adjustment had authority to deny the permit, even though the use was expressly per-

1. 254 S.C. 19, 173 S.E.2d 136 (1970).
2. Columbia, S.C., Zoning Ordinance 87 (1963).
3. 254 S.C. 19, 22, 173 S.E.2d 136, 137 (1970). It is interesting to note that there was at that time an existing filling station directly across the street from the property in question and within the same C-4 zoning district. *Id.*

mitted, under a provision of the zoning ordinance dealing with C-4 districts which includes under the heading, Prohibited Uses and Structures:

> Any use which the Board of Adjustment, upon appeal and after investigation of similar uses elsewhere, shall find to be potentially noxious, dangerous or offensive to persons in the district or to those who pass on the public ways by reason of odor, smoke, noise, glare, fumes, gas, vibration, threat of fire or explosion, . . . or likely for other reasons to be incompatible with the character of the district.[4]

The appellant contended that the term, *district*, as used in the above provision, means the surrounding districts *or neighborhoods*. The C-4 district in which Mrs. Niggel's property was located, while containing no residences, was completely surrounded by residential districts.[5] In denying the use permit for the filling station, the Board of Adjustment apparently accepted the appellant's contention as to the meaning of "district" as used in the ordinance.[6] In holding that the action of the Board of Adjustment in adopting this meaning of "district" was error, the court stated:

> The *incompatability* of the proposed use of respondent's property must be determined, under the clear terms of the Ordinance, from the character of the *district* in which it is situated and not by the character of the surrounding districts. Any other construction would render the zoning districts meaningless because it would, in effect, confer upon the Board of Adjustment the power to rezone any district in the City by determining incompatability with reference to the character of the surrounding districts and not the district in which the property involved is located. Clearly, the Board of Adjustment has no authority to rezone.[7]

B. *Reliance on Existing Permitted Use*

*Pure Oil Division v. City of Columbia*[8] arose under circumstances quite similar to those in *Niggel*, in that both cases in-

4. Columbia, S.C., Zoning Ordinance 80 (1963).
5. 254 S.C. 19, 22, 173 S.E.2d 136, 137 (1970).
6. *Id.* at 24, 173 S.E.2d at 138.
7. *Id.*
8. 254 S.C. 28, 173 S.E.2d 140 (1970).

volved the Board of Adjustment's denial of a zoning permit for the construction of a gasoline filling station in a C-4, general commercial, district in which gasoline filling stations are specifically permitted as a proper use. The two cases are similar also in that in both cases the C-4 districts in question were completely surrounded by residential districts; and in both cases the trial court, on a writ of certiorari, reversed the decision of the Board of Adjustment on basically the same grounds. In *Pure Oil*, however, while the writ of certiorari was before the trial court, the Columbia City Council scheduled a hearing to consider an amendment to the zoning ordinance, the purpose of which was to prohibit the use of the respondents' property for a gasoline filling station. The respondents obtained an order from the trial court restraining the City of Columbia from taking any action to rezone the respondents' property.[9] The appellants then appealed from the order of the trial court requiring the permit to be issued to the respondents and continuing in effect the previous restraining order.

The court, affirming the order of the trial court requiring the issuance of the permit, cited its decision in *Niggel* which was handed down concurrently with the decision in this case.[10] The court then noted that the issuance of the restraining order in this case, even if such were improper, did not affect the ultimate rights of the parties, as the respondents would not have been deprived of their right to the permit sought even if the ordinance had been amended.[11] This holding was predicated on the fact that the respondents, relying on the C-4 designation of their property, had entered into a lease for the construction and operation of a gasoline filling station on the property in question and had undertaken an extensive reorganization of the entire property in anticipation of the construction of the filling station.

The court recognized the rule that, "when a zoning or building permit has been properly issued and the owner has incurred expenses in reliance thereon, he acquires a vested property right

9. *Id.* at 31, 137 S.E.2d at 141.
10. 254 S.C. at 32, 173 S.E.2d at 142.
11. 254 S.C. at 33, 173 S.E.2d at 142. The supreme court, *citing* 43 C.J.S. *Injunctions* § 118 (1945), and 42 AM. JUR. 2D *Injunctions* §§ 170-71 (1969), noted that the court ordinarily cannot enjoin a municipality from performing legislative functions.

therein of which he cannot be deprived without cause or in the absence of public necessity."[12] The court continued:

> We see no sound reason to protect vested rights acquired after a permit is issued, and to deny such protection to similar rights acquired under an ordinance as it existed at the time a proper application for a permit is made. In both instances, the right protected is the same, that is, the good faith reliance by the owner on the right to use his property as permitted under the Zoning Ordinance in force at the time of the application for a permit.[13]

Citing *Kerr v. City of Columbia*[14] as authority for this principle, the court held that the respondents were entitled, under the then existing ordinance, to a permit to construct and operate a filling station on the lot in question and that the Board of Adjustment could not legally refuse to issue it, even under a subsequently enacted ordinance prohibiting that use.

C. *Determining the Extent of a Prior Non-Conforming Use*

*Conway v. City of Greenville*[15] was an action by a property owner to require the city of Greenville to rezone a portion of his property to permit the construction of a shopping center. The plaintiff had purchased the property in question for the purpose of operating a construction business prior to its annexation by the city.

In opening and operating this business, the plaintiff constructed several buildings for use in the business, two private residences, and a lake on the property. In addition to constructing the buildings, the plaintiff used portions of the property for the storage of heavy construction equipment and construction materials. While the property was being used in this manner, it was annexed by the city of Greenville and automatically zoned for use as an A-1 single-family dwelling district. The plaintiff shortly thereafter sought to have the property rezoned for light industrial use, but was only partially successful, the rear portion of the property being retained in the "A-1"

12. 254 S.C. at 34, 173 S.E.2d at 143, *citing* Nuckles v. Allen, 250 S.C. 123, 156 S.E.2d 633 (1967); Pendleton v. City of Columbia, 209 S.C. 394, 40 S.E.2d 499 (1946); Willis v. Town of Woodruff, 200 S.C. 266, 20 S.E.2d 699 (1942). For a brief discussion of *Nuckles v. Allen*, see *1968 Survey of South Carolina Law - Property*, 20 S.C.L. REV. 643 (1968).
13. 254 S.C. at 34, 173 S.E.2d at 143.
14. 232 S.C. 405, 102 S.E.2d 364 (1958).
15. 173 S.E.2d 648 (S.C. 1970).

category. The plaintiff later sought to have the portion of her property zoned "H light industrial district" and a portion of the property then zoned "A-1 single-family dwelling district" rezoned to "E-1 shopping center district." The application was recommended for approval by the City Planning and Zoning Commission, but was rejected by the City Council. The plaintiff then brought this action, in which the trial court dismissed the complaint.

On appeal the supreme court, reversing and remanding to the trial court with directions to the trial court to issue an appropriate order directing the city to reconsider the application, considered two basic questions: (1) whether the plaintiff had the right to use the entire property involved for business purposes, and (2) whether the discontinuance of the business on the death of the plaintiff's husband constituted abandonment of the commercial use of the property.

In considering the first question, the court noted that in *James v. City of Greenville*[16] the court held that the police power of a municipality to enact zoning ordinances restricting the use of privately owned property is not unlimited, and "does not permit a municipality to impair or destroy vested property rights acquired prior to the annexation of property to the city."[17] While the defendants agreed that the plaintiff had a right to continue the operation of the construction business on the property after annexation, the defendants maintained that the business use was confined to a limited area and should not be extended to the entire tract. Accepting the statement that

> the criterion [for determining the extent of an existing non-conforming use] is whether the nature of the incipient non-conforming use, in light of the character and adaptability to such use of the entire parcel, manifestly implies an appropriation of the entirety to such use prior to the adoption of the restrictive ordinances,[18]

the court held that the question of whether the partial use of the tract by the plaintiff for business purposes extended to the entire tract must be determined from the facts of the case. In examining the facts, the court noted, *inter alia*, that, (1) while the business activity centered on only a portion of the tract, the

16. 227 S.C. 565, 88 S.E.2d 661 (1955).
17. 173 S.E.2d at 650.
18. Annot., 87 A.L.R.2d 4, 22 (1963). *See also* RATHKOFF, THE LAW OF ZONING AND PLANNING § 2, at 60-3 (3d ed. 1956); 101 C.J.S. *Zoning* § 192, at 954 (1958); 58 AM. JUR. *Zoning* § 151 (1948).

nature of the business and the types of material and equipment involved required the availability of large open storage space, (2) that the fact that the plaintiff occupied a residence on the premises was not inconsistent with the dominant business character and use of the property, (3) that the property fronted on a heavily traveled commercial thoroughfare and the adjacent property on both sides of the plaintiff's property had been developed principally for commercial and industrial use, and (4) that the rear of the plaintiff's property, which was within the old city limits, was already zoned for residential use and would constitute a buffer of approximately 200 feet between the area in question and the nearest residential area to the east. In light of these facts, the court held that the plaintiff had acquired a vested right to use the property for the operation of a construction business and that this right extended to the entire tract.

In considering the question of whether the discontinuance of the business on the death of the plaintiff's husband constituted an abandonment, the court noted that, while it is well settled that the right to continue a nonconforming use may be lost by abandonment, "[i]n order to constitute abandonment, it must appear that there was a discontinuance of the nonconforming use with the *intent to relinquish the right to so use the property.*"[19] The plaintiff's husband, who was president of the construction business operated on the property in question, died some six months after the rezoning application was filed. He had been ill for a number of years prior to his death, and during that time the business had steadily declined. Noting that the discontinuance of the business occurred during the progress of the litigation and that the only reasonable inference was that, "but for the death of the appellant's [plaintiff's] husband, the business would not have been discontinued at that time,"[20] the court held that the closing of the business at the death of the husband was an involuntary cessation of use and did not constitute abandonment, since the requisite intent to abandon did not exist.

## II. Restrictive Covenants

In *Morris v. Townsend*[21] the defendant, counterclaiming against the plaintiffs, alleged that the plaintiffs were violating a restrictive covenant imposed on a portion of their land. The

19. 173 S.E.2d at 652, *citing* 101 C.J.S. *Zoning* § 198 et seq. (1958). *See also* Witt v. Poole, 182 S.C. 110, 188 S.E. 496 (1936).
20. 173 S.E.2d at 653.
21. 253 S.C. 628, 172 S.E.2d 819 (1970).

plaintiffs had acquired an eighteen acre tract of land on which they constructed a sixty-unit mobile home park which included, as one of its advertised attractions, a three acre recreation and picnic area bordering on the defendant's private lake. A portion of this recreation area consisted of one and one-tenth acres, referred to as Parcel B, which was subject to the following restriction by deed from the defendant: "(1) That said property shall be used for residential purposes only, and no trailer, mobile home, tent, basement or shack shall be placed, located, or used thereon."[22]

The defendant's counterclaim alleged that the plaintiffs violated the above restriction by permitting and encouraging cooking, picnicking, games, and other recreational use by the residents of the trailer park. The plaintiffs, while admitting that the property was used for picnicking and recreational purposes, maintained that these activities were not commercial in nature, but "entirely incidental to residential purposes."[23] The court, however, agreed with the finding of the master and the trial judge that the plaintiffs were making commercial use of the property in violation of the restrictive covenant. These findings were predicated on the fact that the recreation area was available to all tenants of the mobile home park, which fact had been used by the plaintiffs in advertising designed to attract tenants to their mobile home park, which was undeniably a commercial enterprise.[24]

## III. MORTGAGES

*Flowers v. Oakdale Realty and Water Corp.*,[25] an action for ejectment, raises but does not decide a question noted by the court as being one of novel impression in South Carolina.[26] The question raised is what interests does a mortgagor, after defaulting, acquire on purchasing the mortgage property at a foreclosure sale, when the mortgagor's interest was subject to a remainder in fee simple in her children. A key question in

22. *Id.* at 632, 172 S.E.2d at 821.
23. Brief for Appellants at 11, Morris v. Townsend, 253 S.C. 628, 172 S.E.2d 819 (1970).
24. *See* Baltz, Inc. v. R. V. Chandler & Co., 248 S.C. 484, 151 S.E.2d 441 (1966).
25. 253 S.C. 522, 171 S.E.2d 863 (1970).
26. *Id.* at 527, 171 S.E.2d at 865. In reversing this case on other grounds, the court noted that the case seemed to be one of novel impression and held that it was improper to sustain the defendant's demurrers so as to disallow the production of evidence in the matter and thwart arguing the points of law relative to the novel question.

*Flowers* was what interest the mortgagor actually held in the property at the time it was mortgaged. The plaintiff contended that the mortgagor held a life estate subject to a remainder in fee simple in the plaintiffs, while the defendants maintained and the trial judge held that "[u]nder the Will, as stated in the complaint, Theo Young Flowers [the mortgagor] was the *cestui que* trust and not a life tenant."[27] On appeal the court, not having before it the entire will under which Theo Young Flowers claimed, intimated no view as to the correctness of this ruling.

While the question of what interest the mortgagor acquires on purchasing the mortgaged property at a foreclosure sale after default does not appear to have been answered specifically in South Carolina, it has been treated in other jurisdictions.[28] This question is also specifically treated in the *Restatement of Property*, where it is stated:

> When an estate for life and a future interest exist in the same land, and both interests become subject to sale for the collection of a sum of money, and, as between the owner of the estate for life and the owner of such future interest, this whole sum is payable by the owner of the estate for life, or out of his estate, then the owner of the estate for life, by acquiring the interests so sold, acquires no interest which he can assert in derogation of the said future interest.[29]

In the comments to the above section it is clear that this section is "applicable to a sale occurring for the collection of a principal sum, which by the terms of the instrument creating the right thereto is made primarily payable by the owner of the estate for life."[30] This principle is supported by statements in both *American Jurisprudence*[31] and *Corpus Juris Secundum*.[32]

A South Carolina case which is somewhat parallel to the present case and which lends support to the principle set forth above is *Morris v. Lambert*.[33] In *Morris*, which deals with title to land acquired at a tax sale, the court cited the following:

27. 253 S.C. at 526, 171 S.E.2d at 865.
28. *See, e.g.*, Wheeler v. Kajee, 253 S.W.2d 378 (Ky. 1952); Lowery v. Lyle, 226 Mich. 676, 198 N.W. 245 (1924); Creech v. Wilder, 212 N.C. 162, 193 S.E. 281 (1937); Edwards v. Pucket, 268 S.W.2d 582 (Tenn. 1954).
29. RESTATEMENT OF PROPERTY § 149 (1936).
30. RESTATEMENT OF PROPERTY § 149, comment *a* at 490 (1936).
31. 33 AM. JUR. *Life Estates, Remainders, Etc.* §§ 462-63 (1941).
32. 31 C.J.S. *Estates* § 35 (1964).
33. 218 S.C. 384, 62 S.E.2d 841 (1950).

> [O]ne who, by virtue of an existing legal or contractual relation with another is under an obligation to such person to pay the taxes on lands, but who omits to pay such taxes, cannot be allowed to strengthen his title to such land by buying in the tax title when the property is sold as a consequence of his omission to pay the taxes on it, and *his purchase at the sale will merely operate as a payment of the taxes, and the title will be the same as it was before the sale*, except that the lien for taxes is discharged.[34]

Several other South Carolina cases,[35] while not directly on point, seem to support the general principle that a party holding a life estate may not better his title at the expense of persons having a future interest in the same land.

## IV. DEEDS AND GRANTS

### A. *Conflict Between Grant and Habendum*

The court, in *Bean v. Bean*,[36] followed a long line of precedent in this state[37] in once more rejecting the so-called "modern rule"[38] for reconciling a conflict between the granting and habendum clauses of a deed. The action in *Bean* was brought by the plaintiff under the Uniform Declaratory Judgment Act[39] to have the court construe a deed from C. W. Bean, Sr. to his wife, (the plaintiff, Mrs. Vera Gray Bean), and determine the rights and interests of the parties. The applicable portions of the deed out of which the controversy arose are as follows:

> (1) The granting clause: "unto the said Vera Bean for and during the term of her natural life or widowhood, and in the event of her remarriage, to my son, Charles William Bean, Jr., his heirs and assigns forever."
> (2) The habendum clause: "TO HAVE AND TO HOLD all and singular the said Premises before mentioned unto the said Vera Gray Bean, her Heirs and Assigns forever."

34. 218 S.C. at 391, 62 S.E.2d at 844, *quoting from* 51 AM. JUR. *Taxation* § 1054 (1944).
35. Scurry v. Edwards, 232 S.C. 53, 100 S.E.2d 812 (1957); Anderson v. Butler, 31 S.C. 183, 9 S.E. 797 (1889); McCelvey v. Thomson, 7 S.C. 185 (1875).
36. 253 S.C. 340, 170 S.E.2d 654 (1969).
37. *See* Note, *The Effect of A Conflict Between The Granting and Habendum Clauses in Deeds in South Carolina*, 10 S.C.L.Q. 431 (1958).
38. *Id.* at 433.
39. S.C. CODE ANN. § 10-2001, et seq. (1962).

> (3) The warranty clause: "And I do hereby bind Myself and my Heirs, Executors, and Administrators to warrant forever defend all and singular the said premises unto the said Vera Gray Bean, her Heirs and Assigns, against me and my Heirs and against every person whomsoever lawfully claiming or to claim the same or any part thereof."[40]

The plaintiff contended that, under the terms of the deed above quoted, she was the owner in fee simple of the real estate in question,[41] while the defendant maintained that her estate was "limited to the term of her natural life or widowhood, with the [vested] remainder to him in fee simple upon her death or remarriage."[42] Although the master recommended that the court declare that the deed conveyed to the plaintiff a fee simple title subject to the conditional limitation that, should she remarry, the title and interest would vest in the defendant, the trial court held that "the remainder interest in the land is now vested absolutely in fee simple in the respondent."[43]

In reversing the judgment of the trial court, the supreme court first reviewed the rules for construing a deed in South Carolina. The keystone of these rules appears to be that "the cardinal rule of construction is to ascertain and effectuate the intention of the parties, *unless that intention contravenes some well settled rule of law or public policy.*"[44]

In further developing these rules of construction, the court stated:

> In ascertaining such intention the deed must be construed as a whole, and effect given to every part thereof, if such can be done consistently with the law. Intention is a term of art and signifies the meaning of the writing; however, the intention of a grantor will not be allowed to prevail if it runs counter to an established rule of law.[45]

An examination of the granting clause of the deed in question disclosed that, if the plaintiff remarried, the property would go

40. 253 S.C. at 342, 170 S.E.2d at 655.
41. Brief for Appellant at 3, Bean v. Bean, 253 S.C. 340, 170 S.E.2d 654 (1969); indicating that, as used in this brief, the term, fee simple, includes the fee defeasible or determinable estate.
42. 253 S.C. at 342, 170 S.E.2d at 655.
43. *Id.* at 343, 170 S.E.2d at 655.
44. *Id.* (emphasis added).
45. *Id.* (citations omitted).

to the defendant, but that there was no disposition of the fee to the property upon the natural termination of the plaintiff's life estate. Thus, the granting clause of the deed failed to make a complete disposition of the estate without recourse to the habendum and warranty clauses. With regard to a situation such as this, where the granting clause of the deed is incomplete, the court found that:

> The rule in this State is that where an incomplete or indefinite estate is conveyed by the granting clause, as for instance where no words of inheritance accompany the grant, or where the granting clause creates a life estate, resort may be had to the habendum for the purpose of ascertaining the intention of the grantor and thus a life estate may be enlarged into a fee simple estate.[46]

The court, in holding that the plaintiff took a fee simple defeasible estate subject to divestment in the event that she remarried, and that in that event title would vest in the defendant, relied on the court's rationale in *Wilson v. Poston*.[47] The *Wilson* court held that, where a complete estate is not created in the granting clause and the granting clause contains a conditional limitation, the granting clause with its conditional limitation must be taken as it stands when the habendum clause is used to enlarge the incomplete estate.

The defendant had relied on the rule that "where the granting clause in a deed purports to convey title in fee simple absolute, that estate may not be cut down by subsequent words in the same instrument."[48] The court, while apparently accepting the rule as stated, distinguished the case relied on by the defendant from the present case by noting that, in the cases cited by the defendant, absolute (complete) estates were created in the granting clause, while the granting clause in the present case created an incomplete estate.

B. *Vested Remainders*

*Lee v. Citizens and Southern National Bank*[49] was an action by the vendor against the purchaser for specific performance of

46. *Id., citing* Wilson v. Poston, 129 S.C. 345, 123 S.E. 849 (1924); Zobel v. Little, 120 S.C. 212, 113 S.E. 68 (1922); Chavis v. Chavis, 57 S.C. 173, 35 S.E. 507 (1900).
47. 129 S.C. 345, 123 S.E. 849 (1924).
48. Brief for Respondent at 7, Bean v. Bean, 253 S.C. 340, 170 S.E.2d 654 (1969).
49. 253 S.C. 556, 172 S.E.2d 114 (1970).

a contract to purchase realty. The vendor had tendered a deed to the defendant, who refused to perform and alleged that the plaintiff did not have a good title which he could convey. The defendant maintained that under the terms of the will of Robert A. Smythe, Richard Smythe Lee had a contingent remainder which could not be conveyed.

The testator devised a life estate to W. Loring Lee, Jr., with the remainder at his death to his son, Richard Smythe Lee. The terms of the will provided that, should the life tenant predecease the testator, then his wife would take the life estate with the remainder to her son, Richard. The will further provided that should Richard predecease the testator, then his brother Loring would take the remainder.[50] The defendants contended that in order for Richard to take, he must survive not only the testator, but both of his parents as well, and that his remainder was therefore contingent.[51]

The supreme court, in finding for the plaintiff, stated in a per curiam opinion adopting the Order of Judge McFaddin:

> [T]he words "should Richard Smythe Lee predecease me *and* both of his parents" have the opposite meaning than that contended by the defendant. The word "and" is to be construed literally and when Richard survived the testator it then became impossible for him to predecease "me and both of his parents", and the estate thereby vested in him, in remainder, in fee simple. The testator could not have intended that the remainderman survive all three because such an intention would be illogical.[52]

The court further found that the four requirements for creating a vested remainder, as set forth in Justice Cothran's concurring opinion in *Avinger v. Avinger*,[53] were met in this case.

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50. *Id.* at 561, 172 S.E.2d at 116.
51. *Id.* at 560, 172 S.E.2d at 116.
52. *Id.* at 561, 172 S.E.2d at 116.
53. 116 S.C. 125, 130, 107 S.E. 26, 28 (1921).
> [T]o create a vested remainder the following essential elements must appear: (1) The estate in remainder must be fixed and certain in the remaindermen at the time of its creation; (2) implied in the foregoing, the vesting of the remainder must not depend upon the performance or happening of a condition precedent; (3) the person to take in remainder must be an ascertained person in being; (4) the enjoyment of the possession of the estate in remainder is simply postponed; there being no obstacle to such enjoyment except the preceding particular estate.

## V. CONDEMNATION

### A. *Damages*

*State Highway Department v. Smith*[54] presented the question of whether it was proper to permit testimony and give jury instructions as to depreciation of personal property used by a landowner in the conduct of his business on land condemned by the highway department, where the personal property was not taken by the condemnor. The personal property in question consisted of such items as a meat case, an adding machine, a cash register, etc., used by the landowner in the conduct of his business on the condemned land. The landowner had removed this personal property from the premises in anticipation of condemnation but before the property was taken.

The supreme court, in holding that the personal property was not included in the taking, and that the lower court erred in allowing testimony as to damages to personal property, stated:

> When land is taken under the power of eminent domain, the ownership of personalty kept on the premises taken, but not permanently affixed thereto, is not affected; and the owner is entitled to remove, same as was done here. Actually, here the removal of the personal property was done by the landowner *before* the taking of the land and buildings thereon.[55]

In support of its holding the court quoted from *Williams v. State Highway Commission*[56] to the effect that a majority of state courts have held that in the absence of a statute or agreement to the contrary, breakage or other injury to personal property caused by its removal from condemned land cannot be considered as an element of damages, since such losses do not constitute a taking of property.[57]

In a spirited dissent, Justice Bussey, while noting that the majority view is supported by what appears to be the clear weight of persuasive authority from other jurisdictions, stated that the question presented was one of novel impression in this jurisdiction. Distinguishing the rationale of the cases cited in *Williams* as "not in accord with our constitutional provision and the prior interpretations thereof,"[58] he further stated:

54. 253 S.C. 639, 172 S.E.2d 827 (1970).
55. *Id.* at 641, 172 S.E.2d at 828.
56. 252 N.C. 141, 113 S.E.2d 263 (1960).
57. 253 S.C. at 642, 172 S.E.2d at 828.
58. 253 S.C. at 643, 172 S.E.2d at 829.

> We have consistently held that a deprivation of the ordinary beneficial use and enjoyment of one's property is equivalent to the taking of it, and is as much a "taking" as though the property were actually appropriated to the public use. We have consistently held that within the purview of this constitutional provision there is no real distinction between taking and damaging and that the least damage to property constitutes a taking within the purview of the Constitution.
>
> It is true that none of the cited cases deal with damage to personal property as opposed to damage to real property, but since personal property is property within the constitutional provision, the fact that personal property was not involved in these cases affords no true basis for distinction.[59]

Considering the question of compensation for personal property taken or injured under condemnation proceedings to be a constitutional question, Justice Bussey noted that section 33-135 of the 1962 Code of Laws[60] specifically provides for special damages for the landowner as a part of his compensation upon acquisition of a highway or right of way. Stating that he was unaware of any decisions confining special damages to only such as are sustained in connection with the remainder of the real property, he further stated:

> Special damages should include any damages or decreases in actual value in the remainder of the landowner's property, whether real or personal, which are the direct and proximate consequence of the acquisition of the right of way. Such is the only possible interpretation of the statutory provision if just compensation is to be awarded in compliance with the Constitution.[61]

B. *Taking by a Municipality*

In *Cameron v. City of Chester*[62] the court reaffirmed its decision in *Sease v. City of Spartanburg*,[63] that, where the state has delegated the authority to take property for a public use, "the determination by the City of the question of necessity for the condemnation will not be upset by the courts in the absence

59. *Id.* (citations omitted).
60. S.C. CODE ANN. § 33-135 (1962).
61. 253 S.C. at 644, 172 S.E.2d at 829.
62. 253 S.C. 574, 172 S.E.2d 306 (1970).
63. 242 S.C. 520, 131 S.E.2d 683 (1963).

of a showing of fraud, bad faith, or clear abuse of discretion."[64]

In *Cameron* the City of Chester had instituted condemnation proceedings[65] to acquire the plaintiff's property for use as a part of an off-street parking facility. The plaintiffs brought suit to enjoin the city from condemning their property on the grounds that there was no necessity for the city to exercise its power of eminent domain; that, by so doing, the city was guilty of fraud, bad faith, and abuse of discretion; and that the property was not sought for a public use. In affirming the decision of the trial court, the court promptly disposed of the contention that a municipal parking facility was not a public use by calling attention to its decision in *Sammons v. City of Beaufort*,[66] where the court held that off-street parking for all members of the public did constitute a public use.

Turning next to the ground of lack of necessity, the court reaffirmed its decision in *Sease*. In *Sease* the court had held that in this state the rule is that the decision as to the question of necessity lies with the one to whom authority to take property has been delegated, and that the decision is not subject to review by the court in the absence of a showing of fraud, bad faith, or clear abuse of discretion.[67] The court concluded that in the present case the charges of fraud, bad faith, and abuse of discretion were not sustained by the evidence.

## VI. RIPARIAN RIGHTS

*Morris v. Townsend*[68] presented the question of the right of a landowner to the use and benefit of a lake covering part of his property, where the lake was created by the erection of a dam by another landowner on his own property. Over a period of years, the defendant had acquired approximately 200 acres of land bordering on both sides of Big Jackson Creek in Richland County. In 1963 at his own expense he constructed a dam which created a lake covering some 50-55 acres, one to two acres of which covered part of an adjoining tract acquired by the plaintiffs on June 17, 1967. On June 7, 1967, the defendant had acquired from the plaintiffs' predecessors in title an easement to flood and submerge and impound waters in perpetuity upon the

64. 253 S.C. 574, 577, 172 S.E.2d 306, 307 (1970).
65. The condemnation proceedings were instituted under the provisions of the Off-Street Parking Facilities Act, S.C. CODE ANN. § 59-566 et seq. (1962).
66. 225 S.C. 490, 83 S.E.2d 153 (1954).
67. 242 S.C. 520, 131 S.E.2d 683 (1963).
68. 253 S.C. 628, 172 S.E.2d 819 (1970).

lands now owned by the plaintiffs. After acquiring title to the tract which included some of the land covered by the defendant's lake, the plaintiffs constructed on this tract a sixty unit mobile home park which included a recreation area on the lake.

In this action the plaintiffs sought a permanent injunction to compel the defendant to remove a no trespassing sign which he had erected on his property. The defendant, counterclaiming, alleged that he built the dam which created the lake at his own expense and had the sole right to the use and control of the lake. The recommendations of the master in equity, that the complaint be dismissed and that the relief sought in the counterclaim be granted, were adopted in toto by the trial judge. On appeal the supreme court held that the trial judge did not err in enjoining and restraining the plaintiffs from using the waters of the lake *either above the property owned by the plaintiffs or above the property owned by the defendant.*

The court discussed its holding in two parts. With regard to the plaintiffs' use of the waters of the lake *above the defendant's land*, the court stated, "One not a riparian owner (as the plaintiffs here), but seeking to make use of the waters of a lake created by the dam of another, must base his claim upon a right acquired through prescription or grant."[69] In so holding, the court rejected the plaintiffs' contention that "[i]t would seem that the distinction between the natural and a man-made lake should have little basis for such a distinction in the law."[70]

The plaintiffs had argued that, since Big Jackson Creek was undeniably a natural stream or creek, the defendant's action in constructing the dam had "proceeded only to one step further"[71] than nature in placing the waters of the creek where they were, the implication being that the plaintiffs should be considered riparian owners. Had the plaintiffs been successful in this line of reasoning, they would have come under the general rule that

> [t]he owner of a part of the bed of a lake or pond has exclusive rights in the water above it, but a riparian owner may generally use the surface of the whole lake as far as such use does not interfere with the reasonable use by the riparian owner.[72]

69. *Id.* at 633, 172 S.E.2d at 822.
70. Brief for Appellants at 4, Morris v. Townsend, 253 S.C. 628, 172 S.E.2d 819 (1970).
71. *Id.*
72. 93 C.J.S. *Waters* § 105 (1956), *cited in* Brief for Appellants at 4, 253 S.C. 628, 172 S.E.2d 819 (1970).

The court's discounting of the plaintiffs' status as riparian owners was apparently based on acceptance of the defendant's contentions that "[r]iparian rights attach to lands adjoining *permanent* bodies of water,"[73] and that, "[i]n the development of the law of waters, only those owners along a *natural* watercourse or touching a *natural* lake are entitled to share in the use of waters where said waters are non-navigable."[74] The court noted further that an examination of the three instruments involved in the creation of the easement in favor of the defendant disclosed nothing to indicate an intent on the part of the grantors or the grantee that the defendant surrender his rights to control his lake. The court concluded, "The defendant as owner in fee simple of his land, clearly has the exclusive right to use and control that part of the lake which lies above his own land, and has the right to exclude plaintiffs and all other persons claiming by, under, or through them, from any use whatsoever of the defendant's lands and water above said land."[75]

With regard to the relative rights of the parties to the use of the waters of the lake which overlay the plaintiffs' land, the court first considered the plaintiffs' rights under the defendant's easement to flood and submerge the plaintiffs' land. The court found the defendant's easement to be analogous to a railroad's easement to lay track or a telephone company's easement to erect poles and wires across the landowner's property. Maintaining that no one would seriously argue that the landowner was entitled to use the train or to connect a telephone to the wires, the court stated, "By a like token, in this case the defendant acquired an easement to extend the waters of his lake onto the property of the adjoining landowners, and it cannot be logically argued that the landowners have acquired the right to use the water and the lake it composes to their own benefit."[76] Referring to the examples cited and to the instant case, the court held that, "[i]f . . . the landowner is to acquire an interest in railroad track or in the telephone lines or in the lake waters, the rights would have to appear in the instruments creating the easement."[77] The court found that in the instant case the instru-

73. Brief for Respondents at 7, Morris v. Townsend, 253 S.C. 628, 172 S.E.2d 819 (1970), *citing* 93 C.J.S. *Waters* § 104 (1956).
74. Brief for Respondents at 7, Morris v. Townsend, 253 S.C. 628, 172 S.E.2d 819 (1970) (emphasis added).
75. 253 S.C. at 634, 172 S.E.2d at 822.
76. 253 S.C. at 635, 172 S.E.2d at 822.
77. *Id.* at 635, 172 S.E.2d at 823.

ments involved did not give the plaintiffs any interest in or privilege to use the waters of the defendant's lake.[78]

## VII. STREETS AND HIGHWAYS

In *City of Greenville v. Bozeman*[79] the plaintiff brought an action for declaratory judgment seeking, *inter alia*, (1) a declaration concerning the validity of the closing of certain public streets and (2) the rights of the various property owners abutting thereon. In a per curiam opinion the supreme court adopted the judgment of the trial court validating the city's actions and settling the rights of the various property owners in the closed streets.

This action arose out of an agreement between the city of Greenville and The Peoples National Bank regarding the redevelopment of a three block area in downtown Greenville. A necessary part of this redevelopment was the closing of several streets and the closing of a part of another street. In arriving at its holding that the action of the city in closing the streets in question was valid and proper, the court noted that the city had conducted very thorough and extensive investigations and studies of the project and that the agreement had been entered into only after full public hearings and due consideration of all surrounding facts. The court went on to state that under section 47-1327 of the South Carolina Code of Laws[80] the city unquestionably had the authority to close the streets in question so long as it proceeded properly and that "the Courts will not interfere with the exercise of discretionary powers by a municipal body except in cases of fraud or clear abuse of power . . . ."[81] With regard to one defendant's opposition to the closing of the streets on the ground of inconvenience because of his having to use a more circuitous route, the court found that the inconvenience was outweighed by the advantages to be derived by the public generally.

Turning to the question of the rights of abutting owners to ownership in the streets in question, the court stated:

> [T]he rule which is generally accepted and which is followed in South Carolina is that in the absence of some statutory disposition, abandonment or vacation of a

78. *Id.* at 635, 172 S.E.2d at 822.
79. 175 S.E.2d 211 (S.C. 1970).
80. S.C. CODE ANN. § 47-1327 (1962).
81. 175 S.E.2d at 215, *citing* Bethel M.E. Church v. City of Greenville, 211 S.C. 442, 45 S.E.2d 841 (1947).

> public street vests absolute possession and title in the abutting property owners and not the original owner, at least unless the original owner is the abutting owner at the time of the vacation, or has specifically reserved the right of reservation on vacation.[82]

Noting no evidence in the record to show that the original owner had specifically reserved the right of reservation on vacation, the court held that the rule stated above was applicable and that the vacated portions of the streets in question were to vest in the abutting property owners, to the center line of the street, at such time as the streets were actually vacated.

T. C. R. LEGARE, JR.

82. 175 S.E.2d at 216, *citing* State Highway Dep't v. Allison, 246 S.C. 389, 143 S.E.2d 800 (1965); City of Rock Hill v. Cothran, 209 S.C. 357, 40 S.E.2d 239 (1946).