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Property

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PROPERTY

I. EMINENT DOMAIN

Eminent domain was the most often litigated topic in the area of property during the past survey year. Despite this fact, there were no drastic modifications of prior case law and most of the cases either restated prior holdings or involved logical expansion of previous holdings.

The much-publicized case of *Timmons v. South Carolina Tricentennial Commission*[1] actually included two cases: first, an action brought by the Tricentennial Commission against Mrs. Timmons to acquire a parcel of her real estate through the power of eminent domain and, secondly, an action brought by Mrs. Timmons seeking to enjoin the Commission from acquiring her property. The former action will hereinafter be referred to as the condemnation proceeding and the latter the injunctive proceeding. Mrs. Timmons prevailed in the condemnation proceeding, getting a money judgment for the property, but lost the injunctive proceeding and, however, appealed both decisions. Both decisions were affirmed by the supreme court and only the injunctive proceeding will be discussed herein as the condemnation decision was appealed only on procedural grounds.

The supreme court determined that the issues raised by Mrs. Timmons had been correctly set forth and disposed of below and adopted part of the order of Judge Grimball as the opinion of the court. In disposing of the objection that there was no necessity for the condemnation, the court relied upon a prior case[2] and stated:

> In the law of eminent domain, it is well established that there must be a necessity for the taking but this does not mean an absolute necessity, but rather a reasonable necessity.[3]

Mrs. Timmons' objection that the taking was not a permanent taking was rejected even though the Commission will expire in 1972 because the property will remain vested in the State of South Carolina and will continue to be used for park purposes. The court in finding that the taking was for a "public use" cited several South Carolina cases which had held that the term "public use" must be flexible and keep abreast of the changing social conditions.[4] Further, it was noted

1. 254 S.C. 378, 175 S.E.2d 805 (1970).
2. Seabrook v. Carolina Power & Light Co., 159 S.C. 1, 156 S.E. 1 (1930).
3. Timmons v. South Carolina Tricentennial Comm'n, 254 S.C. 378, 388, 175 S.E.2d 805, 810 (1970).
4. Gasque v. Town of Conway, 194 S.C. 15, 8 S.E.2d 871 (1940); Riley v. Charleston Union Station Co., 71 S.C. 457, 51 S.E. 485 (1904).

that the uses for which this property was being taken had previously been recognized as a "public use" in *Mims v. McNair*,[5] a case involving a bond issue with which the Timmons property in part was being purchased. In finding that Mrs. Timmons had not been denied due process and that the statute under which the condemnation took place was valid and clear in its delegation of power, the court found occasion to say "that the legislature can delegate the power of eminent domain to subsidiary agencies is settled."[6]

In *South Carolina State Ports Authority v. Kaiser*[7] the court held that there was a valid necessity for condemnation of land by the State Ports Authority, where there existed a common wall between a building of the Ports Authorty and a building of the appellant, because the appellant's proposed demolition of her building would require the Ports Authority to provide protection and support of its building at prohibitive expense. Relying upon *Sease v. City of Spartanburg*,[8] which held that the supreme court will not review an agency's decision regarding necessity unless there is a showing of fraud, bad faith, or clear abuse of discretion, the court said the fact that the Ports Authority had no firm or definite plans for the future use of the property was insufficient to show bad faith or abuse of discretion. The case was reversed, however, as the trial judge's granting of a jury trial at the insistence of the plaintiff-Ports Authority was determined to be erroneous. The court ruled that section 25-111 of the South Carolina Code, allows objections and/or demands to be made only by a party "in and by a return," that section 25-126 of the South Carolina Code allows a demand for jury trial to be made only by "any person having an interest in or lien upon the property," and further that each of these sections must be read in conjunction with the other. As the Ports Authority could not have made a return to its own notice and had no interest in the property prior to the condemnation, the granting of a jury trial was erroneous and required reversal in part.

The overzealous argument of counsel for the condemnee in a land condemnation case caused a judgment to be reversed and the case remanded for a new trial in *South Carolina Highway Department v. Nasim*,[9] even though no objection was interposed by the opposing

5. 252 S.C. 64, 165 S.E.2d 355 (1969).
6. 254 S.C. at 403, 175 S.E.2d at 817.
7. 254 S.C. 600, 176 S.E.2d 532 (1970).
8. 242 S.C. 520, 131 S.E.2d 683 (1963).
9. 255 S.C. 406, 179 S.E.2d 211 (1971).

counsel. Counsel's abuse of a Highway Department witness, comparing him to the Nazi sympathizers during World War II among other things, was so objectionable that it tended to greatly prejudice the Highway Department's case in the eyes of the jury. The court quoted the following general rule as previously set forth in *Johnson v. Charleston & Western Carolina Railway*:[10]

> It has been settled by many decisions of this court that, except in flagrant cases and where prejudice clearly appears, objection to improper argument of counsel should be made then and there, and comes too late if not made until after the verdict has been rendered.[11]

The court said that it adhered to the rule and reversed this case because counsel's argument fell squarely within the exception.

Galbraith v. City of Spartanburg[12] was an action by condemnees to recover for losses which allegedly resulted from the premature settlement of a condemnation by the City of Spartanburg. The plaintiffs appealed to the supreme court after demurrers to both of the plaintiffs' causes of action were sustained by the lower court. In the original action the issue of necessity had not been raised and the only issue was the question of value. After a jury had been drawn and empaneled, a settlement agreement was reached and a decree was entered in accordance with the agreement. Judge Baker stated:

> A litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former action. Any question of necessity could have been determined in the original action.[13]

He further said that the prior settlement had the effect of judgment, could not be attacked collaterally, and could be opened only by a showing of fraud or lack of jurisdiction. The adequacy of damages awarded was not reopened, even though the plaintiffs argued for additional damages due to a lease cancellation, as all damages of any kind whatsoever should have been taken into account in determining the fair market value of the property and were considerations which were determined in the prior settlement. However, the supreme court did overrule the demurrer to the second cause of action and said there had been an

10. 234 S.C. 448, 108 S.E.2d 777 (1959).
11. *Id.* at 467, 108 S.E.2d at 786.
12. 255 S.C. 380, 179 S.E.2d 37 (1971).
13. *Id.* at 383, 179 S.E.2d at 39.

unreasonable delay in demolition which had deprived plaintiffs of the beneficial use of their property. The court found that the condemnor was obliged to demolish the building located on plaintiffs' land and that a cause of action was stated for failure to demolish within a reasonable length of time.

Hensley v. Riverland Development Corp.[14] was an action for damages for the alleged obstruction of a right-of-way. A demurrer to the plaintiffs' cause of action was sustained for insufficiency of facts to state a cause of action. The plaintiffs' land was surrounded by the defendant's land over which the plaintiffs have a right-of-way easement for an access road. The defendant-corporation granted a right-of-way easement to the South Carolina Highway Department which covered part of the common ground to the plaintiffs' easement. As a result of the Highway Department's construction of a road over the right-of-way, the plaintiffs alleged damage to their easement. The court found that the damages were caused by the encroachment of a highway constructed by the South Carolina Highway Department in performing its public duties, that the Highway Department had the right and duty to acquire the right-of-way by grant or eminent domain, that the defendant committed no wrong by granting the right-of-way, and that the plaintiffs should have their remedy, if any, against the Highway Department. If the road construction constituted a taking of the plaintiffs' property, they were entitled to just compensation as provided for in the South Carolina Constitution.[15]

II. RESTRICTIONS ON THE USE OF REAL PROPERTY

A. Zoning—Permitted Uses

City of Myrtle Beach v. Mayer[16] involved an action brought by the City of Myrtle Beach to enjoin the defendants from operating a children's dancing school in their home in an allged violation of the zoning laws of the city. The applicable section of the zoning ordinance in question permitted the following uses within the residential district in which the defendants reside: "(2) Public schools, elementary, high and education institutions having a curriculum the same as ordinarily

14. 182 S.E.2d 290 (S.C. 1971).

15. Chick Springs Water Co. v. State Highway Dep't., 159 S.C. 481, 157 S.E. 842 (1931).

16. 181 S.E.2d 265 (S.C. 1971).

given in public schools."[17] The defendants argued that their dancing school was a permitted use within the exception allowing an educational institution "having a curriculum the same as ordinarily given in public schools." Further the defendants contended that "the meaning of the word curriculum does not necessarily comprehend the whole body of instruction at a school, but may signify a particular course of instruction in a single discipline."[18] While conceding that the defendant's school was an educational institution which had a curriculum, the municipality urged that the curriculum was not "the same as ordinarily given in public schools." The circuit court, in rejecting the recommendation of the master in equity, found the dancing school was not a permitted use and issued an injunction. In affirming the decision of the lower court, the supreme court noted that, while descriptive terms in zoning ordinances are to be liberally construed in favor of the landowner, saying that the defendants' school and the public schools of Myrtle Beach both teach dancing is far short of saying that, even as to this one discipline, their curricula are the same.

B. Restrictive Covenants

Easterly v. Hall[19] was concerned with the enforcement of restrictive covenants on residential property. The plaintiffs brought an action to restrain and enjoin the defendant, Hall, from constructing a duplex apartment on his property, allegedly in violation of restrictions and protective covenants applicable to his property. A brief summary of the chain of title is necessary to understand this case. Caro C. Powell had acquired title to a forty-nine acre tract of land near Spartanburg in 1935. The property was later bisected by a dual lane highway. The northern sector was subdivided, a plat recorded and all lots conveyed by deeds which contained the following restriction: "That only one residence may be erected on any one lot, but any person may use two or more lots placing one residence thereon."[20] Property south of the highway was conveyed by four deeds which contained the restriction set forth above and the balance of the tract was conveyed to Woodrow W. Willard by a deed containing no restrictions whatsoever. Shortly after being granted the property, Willard subdivided his land into four-

17. Myrtle Beach, S.C., Zoning Ordinances § 32-6 (2).
18. 181 S.E.2d 265, 265-66 (S.C. 1971).
19. 182 S.E.2d 671 (S.C. 1971).
20. *Id.* at 672.

teen lots and imposd, by a separate instrument, strict protective covenants upon all these lots. One restriction stated: "No apartment house or duplex of any type shall be erected or maintained on any of these lots . . . ." All lot owners whose property was located south of the highway, including the defendant Hall, joined in and were signatories to this instrument which in part said that the owners of land south of the highway:

> Desire to provide protective covenants, restrictions and easements for the resubdivision of the Caro C. Powell property as shown on said plat for Woodrow W. Willard, and desire that the same shall be developed and used exclusively for private residential purposes.[21]

It is also necessary to note that all the plaintiffs, except one, had obtained their property through Mr. Willard, and, therefore, had the deed from Caro C. Powell to Woodrow W. Willard, containing no restrictions, in their chain of title.

The court stated:

> [A]s we view the record the question for determination is whether the restrictions contained in the deeds from Caro C. Powell to the appellant and others are valid and enforceable by the respondents.[22]

It was found that Caro C. Powell had manifested a definite scheme for the development of the property. The court also stressed the point that the trial judge had found that Willard had promised Powell to restrict the property to residential use for the protection of those who had previously purchased lots south of the highway even though there were no restrictions in the deed from Powell to Willard. Prior South Carolina cases have held that the general scheme of subdivision development is binding and enforceable among all the landowners as there is mutuality of covenant and consideration and that each landowner has an interest in the negative equitable easements thereby created.[23] Chief Justice Moss further said:

> This court has held that restrictive covenants imposed upon some lots, but not upon others, in the same subdivision were enforceable among all where it was clear from the inception of the

21. *Id.* at 673.

22. *Id.*

23. See Williams v. Cone, 249 S.C. 374, 154 S.E.2d 682 (1967); Edwards v. Surratt, 228 S.C. 512, 90 S.E.2d 906 (1956).

> subdivision that there had been a general plan for its residential development and such plan had been adhered to without material departure therefrom, and it has been understood and relied upon by those concerned.[24]

The appellant's attempt to have the restrictions declared invalid and unenforceable under the rule announced in *Stylecraft v. Thomas*,[25] that "where the granting clause in a deed purports to convey title in fee simple absolute, the estate may not be cut down by subsequent words in the same instrument."[26] The court found that the language restricting the property to single family residences was a restriction and not a condition subsequent that would attempt to reduce the estate to a fee simple determinable.[27] The "right of entry"[28] was an additional way in which the grantor could enforce violations of the restrictive covenants and in no way diminished the rights accruing to the other grantees in the subdivision.

The court concluded that the trial judge had correctly found that the subdivision had been developed with a common scheme and that the several lot owners had the right to the enforcement of the restrictions contained in the several deeds. Interestingly enough, even though the plaintiffs prevailed, by stipulation the defendant was allowed to complete the construction of his duplex but was permanently enjoined from using the structure for more than one family.

III. DEEDS—CAPACITY OF GRANTOR

In *Vereen v. Bell*,[29] an action to rescind and cancel a deed on the grounds of mental incapacity of the grantor, the supreme court followed the criteria previously set forth for determining the mental capacity of the grantor in a deed[30] by stating:

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24. Easterly v. Hall, 182 S.E.2d 671, 674 (S.C. 1971) *quoting* Pitts v. Brown, 215 S.C. 122, 54 S.E.2d 538 (1949).

25. 250 S.C. 495, 159 S.E.2d 46 (1968).

26. *Id.* at 498, 159 S.E.2d at 47.

27. 182 S.E.2d at 674. The first restriction violated the rule announced in *Stylecraft* and was declared void. Restrictions two through seven were upheld.

28. 182 S.E.2d at 675. The "right of entry" was not a right to terminate the estate, but only a right to enter and abate the violation of the restriction.

29. 182 S.E.2d 296 (S.C. 1971).

30. *See, e.g.*, Mathias v. Mathias, 206 S.C. 276, 33 S.E.2d 626 (1945); Cathcart v. Stewart, 144 S.C. 252, 142 S.E. 498 (1928); Hagin v. Barrow, 103 S.C. 450, 88 S.E. 299 (1916).

> Mere infirmity of mind or body, not amounting to incapacity to understand the nature of the act, is insufficient to render a deed void. A person with sufficient mental capacity to comprehend what he is doing and to understand the nature of the act and its consequences has the capacity to make a deed.[31]

The court further noted that, while the action should have been brought in equity rather than as an action at law, a ruling on a motion for a directed verdict was tantamount to a finding of fact by a judge sitting in equity and hence the supreme court had the power to rule on the judgment below. Finding the preponderance of the evidence against the appellant Vereen, the court affirmed the lower court judgment in favor of the defendant.

IV. Partition Of Real Property

Smith v. Hawkins[32] was a partition proceeding in which the appellants-defendants appealed to the supreme court on six exceptions. Simpson Hawkins had died intestate in 1931 survived by his widow, Ida Hawkins, and four children. Shortly thereafter Ida Hawkins conveyed her undivided one-third interest to her son, Asa Hawkins, who in turn reconveyed to his mother a life estate in and to all of his undivided interest in the land. The first exception was that the deeds between Ida Hawkins and Asa Hawkins were witnessed by disqualified parties, that the probate was not signed before a notary public and that the deed from Ida Hawkins to her son was without sufficient consideration. This exception was overruled because a deed improperly witnessed and probated is still good between the parties.[33] The stated consideration, the assumption of a mortgage, was found to be sufficient. As to the second exception, the court said that the allowance of attorney's fees in partition proceedings was within the discretion of the trial judge and there was no error in denying attorney's fees unless there was a showing of abuse of discretion.

The third and fourth exceptions were held to have been waived by the failure to act promptly and to raise the objections in a proper manner. The appellants raised their fifth exception based on Circuit Court Rule 54, which provides, in part:

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31. 182 S.E.2d 296, 297 (S.C. 1971).
32. 254 S.C. 423, 175 S.E.2d 824 (1970).
33. Farmers' Bank & Trust Co. v. Fudge, 113 S.C. 25, 100 S.E. 628 (1919).

> No partition of real estate of a deceased person shall be had unless the legal representative or representatives of such deceased person be made parties to the action . . . or that the personal estate in the hands of the representative or representatives is sufficient for the payment of the debts of such deceased person, or unless in the decree due provision is made for the payment of debts.[34]

As the record showed that approximately forty years had passed since the death of Simpson Hawkins, and any rights of his creditors had long since expired, the court held that the administrator of his estate was not a necessary party. Neither was the administrator of Ida Hawkins, who died in 1967, a necessary party since no claims against her estate were chargeable to the land which she had conveyed in 1931 and in which she had only a life estate at the time of her death. The final objection was that Ida Hawkins had acquired title to the land by adverse possession by virtue of having lived on the land for thirty-five years prior to her death. Without citing authority, the court said that there must be an assertion, or notice of a claim, adverse to that of the owners of the fee to sustain a claim of adverse possession by a life tenant and there was no such notice or assertion in this case.

V. FRAUD

There were two cases, one brought by a grantor and the other brought by a grantee, in March 1971 which involved issues of fraud in real property transactions. While neither case has been finally settled, the rulings on both cases would seem to merit comment. In *Lawson v. Citizens and Southern National Bank of South Carolina*,[35] the South Carolina Supreme Court reversed a circuit court ruling which sustained the defendant's demurrer. Plaintiff Lawson had purchased from the Citizens and Southern National Bank, as trustee, a lot allegedly filled with unsuitable material which was concealed by a covering of soil, and had later built a house upon this lot. After conveying this property to his wife in a divorce proceeding, Lawson and his ex-wife brought an action against the developer for actual and punitive damages for fraudulent concealment of subsurface defects in the land. In reversing the lower court ruling, the court said that Lawson's cause of action ripened upon completion of his dwelling and that the defendant's liability was not erased by Lawson's subsequent conveyance. The final settlement

34. Rules of Practice for the Circuit Courts of South Carolina, No. 54.
35. 180 S.E.2d 206 (S.C. 1971).

of this case should be noteworthy as there is no precedent in South Carolina case law involving non-disclosure of an artificially created and concealed unstable condition of land.

Ayers v. Ackerman[36] was an action by a fee holder to have an allegedly fraudulently obtained lease rescinded and declared invalid. The lease had been given by the plaintiff's mother prior to her conveyance to her son. In ruling on a motion to dismiss, Judge Hemphill cited *Lawson*[37] and said that one in the position of the plaintiff's mother could maintain an action for damages after conveying the property to a third person, and was also a necessary party to the action under Rule 19, Federal Rules of Civil Procedure. The order in this case was mainly concerned with procedural matters of no particular significance to property law.

VI. MISCELLANEOUS

State v. Hanapole[38] involved an interpretation of the South Carolina trespass statute.[39] The supreme court relied upon a 1961 decision[40] in which the court had stated that the act "is clearly for the purpose of protecting the rights of the owners or those in control of private property."[41] In overturning the trespass convictions of the defendants the court found that the airport premises are owned by the Richland-Lexington Airport District,[42] a political subdivision of South Carolina, and are, therefore, public property. As the purpose of the statute is to protect the rights on "private" property and the airport is "public" property, a conviction based on section 16-388 could not stand.

36. 324 F. Supp. 814 (D.S.C. 1971).

37. 180 S.E.2d 206 (S.C. 1971).

38. 255 S.C. 258, 178 S.E.2d 247 (1970).

39. S.C. CODE ANN. § 16-388 (1962). Any person who, without legal cause or good excuse, enters into the dwelling house, place of business or on the premises of another person after having been warned within six months preceding not to do so or any person who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, fails and refuses, without good cause or good excuse, to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative shall, on conviction, be fined not more than one hundred dollars or be imprisoned for not more than thirty days.

40. City of Greenville v. Peterson, 239 S.C. 298, 122 S.E.2d 826 (1961).

41. *Id.* at 303, 122 S.E.2d at 828.

42. S.C. CODE ANN. § 2-390.13 (1962).

In *Sadler v. Lyle*[43] a taxpayers' suit challenging a bond issue in the City of Rock Hill, the appellant contended that the amendment under which the bond issue was approved had not been properly submitted to the people for approval; and, secondly, that the proposed use of the funds did not come within the scope of the language of the special constitutional amendment which removed the debt limitation for bonds whose proceeds are used for "purchase, erection, improvement and maintenance of streets and sidewalks." After disposing of the appellant's first argument on Constitutional grounds, the court addressed itself to the second argument which concerned the fact that the project included several items such as relocation of railroad tracks, the construction of railroad buildings, the construction of overhead bridges and underpasses and off-street parking. Noting several prior cases in which constitutional amendments relaxing the debt limitations had been given a broad interpretation in order to effect the legislative intent,[44] the court found that, even though each specific item did not in and of itself constitute a street improvement, the proposed uses were necessary parts of the overall street improvement program and hence within the scope of the amendment.

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43. 254 S.C. 535, 176 S.E.2d 290 (1970).

44. Knight v. Allen, 234 S.C. 559, 109 S.E. 817 (1959); Bruce v. City of Greenville, 89 S.C. 241, 71 S.E. 817 (1911).