South Carolina Law Review

Volume 25
Issue 3 *Survey of South Carolina Law*

Article 14

10-1973

Property

Wayne Willis

PROPERTY

I. EMINENT DOMAIN

The power of eminent domain is basic to the concept of state sovereignty[1] and may be delegated to and exercised by municipal corporations.[2] Ordinarily, the proceeding is a relatively simple in rem action in which the condemnor obtains title to the condemned land, and the court determines "just compensation" for the landowner as required by the South Carolina Constitution.[3]

City of Spartanburg v. Kimbrell's Investment Co.[4] is not typical of most eminent domain proceedings. This case involved a decision by the City of Spartanburg to condemn thirteen feet of land to widen a street. On this small plot was a building which adjoined another building owned by the defendant Kimbrell, the two being separated by a joint or party wall. These two buildings along with several others had once been part of a single structure known as the Harris Theater Building. After completing the necessary steps, the city proceeded with its plans to demolish the building on the condemned property.

The original action by the city against Kimbrell was brought to determine the rights of the parties with respect to the joint wall separating their respective parts of the building. The city was granted the right to remove its portion by giving due notice to the defendant, which could then take the measures necessary to convert the joint wall into an outside wall and to shore the remainder of the building. Demolition of the city's portion of the building ceased when it became evident that the entire building was in danger of collapsing. Kimbrell had not shored its portion, preferring to wait until the cost of shoring could be estimated. When it became evident that the cost would be prohibitive, Kimbrell notified the city of its intention to vacate the building. The city responded by obtaining an order authorizing it to charge the cost of structurally altering Kimbrell's portion of the building to Kim-

1. Tuomey Hospital v. City of Sumter, 243 S.C. 544, 134 S.E.2d 744 (1964).

2. S.C. CODE ANN. § 47-68.1 (1962).

3. S.C. CONST. art. 1, § 17, provides: "Private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor."

4. 259 S.C. 203, 191 S.E.2d 150 (1972).

brell so that the city could safely demolish the condemned portion.[5]

Referring simply to article I, section 17 of the South Carolina Constitution, the supreme court found the order of the lower court "clearly in error" because, in directing Kimbrell to pay for the alterations, the lower court had authorized a "taking of private property without the consent of the owner and without any compensation therefor."[6]

II. RESTRICTIONS ON THE USE OF REAL PROPERTY

A. *Zoning*

The recent rise in popularity of multifamily housing units has created problems for local zoning boards, most often in the form of requests for exceptions to zoning ordinances. In the case of *Holler v. Ellisor*[7] the issue was whether a county zoning board of adjustment has the power to grant "special exceptions"[8] to the applicable zoning ordinance. The holder of an option to purchase certain tracts applied for a permit to erect multifamily housing within a residential district. This application was denied and the option holder appealed to the zoning board for a special exception. The board granted the exception, after which Holler appealed to the court of common pleas and won a reversal.

In affirming the common pleas court, the supreme court compared the authorized powers of county boards of adjustment with those of municipal boards. The court pointed out that county boards have the "power to hear and decide appeals in cases of asserted error and the power to authorize variances in cases of 'unnecessary hardship' under certain circumstances [prescribed by statute], but there is no provision authorizing the

5. The order also held Kimbrell guilty of willful and intentional contempt of court based on Kimbrell's failure to shore the condemned building. The supreme court dismissed the contempt charge because the lower court order required only that Kimbrell appoint an engineer to deal with unforeseen emergencies during demolition.

6. 259 S.C. at 215, 191 S.E.2d at 155.

7. 259 S.C. 283, 191 S.E.2d 509 (1972).

8. Seven Oaks Area of Lexington County, S.C., Zoning Ordinance No. 3-2.7, provides:

> *Special Exception*: A use of land which is permitted in a particular zoning district only after review by the Zoning Board of Adjustment which body, before authorizing such use, shall find that the location and operation of the proposed use shall not be detrimental to adjoining land or use.

Board to grant 'special exceptions'."[9] The court deemed it significant that the General Assembly in legislating with respect to county boards of adjustment has consistently omitted empowering them to hear and decide special exceptions.

In *Whitfield v. Seabrook*[10] the supreme court considered the permittee's reliance on a building permit.[11] Appellant Whitfield was issued a valid building permit on August 4, 1971, for the construction of an apartment complex. Prior to August 15, 1971, there were no zoning regulations affecting the property in question. On August 3, 1971, the Charleston County Council gave final reading to a zoning ordinance with an effective date of August 15, 1971, the pertinent section reading:

> If, before the effective date of this ordinance, or amendment thereof, a building permit was lawfully issued for a structure not in conformity to this ordinance, or such amendment, the construction authorized by such permit may not be started after such date.[12]

Appellant was advised of the effective date of the ordinance and that he would be required to have started construction of the project before that date. The permit was declared void in October of 1971 for lack of compliance with the zoning ordinance.

Whitfield admitted that he had not begun construction before August 15, 1971, but contended that his actions in reliance on the permit had created in him a vested property right prior to the effective date of the ordinance. In rejecting appellant's argument, the court observed that the only actions initiated by appellant were prior to the issuance of the permit and thus could not have been in reliance on it.[13] The building permit alone created no vested right. "[I]t merely authorized him to act if . . . , at a time when it was lawful, [he] exercised the privilege granted

9. 259 S.C. at 286, 191 S.E.2d at 510, *construing* S. C. CODE ANN. § 14-350.19 (Cum. Supp. 1971). *See also* S.C. CODE ANN. § 47-1009 (1962) which defines the powers of municipal boards of adjustment, including specifically the power to hear and decide special exceptions.

10. 259 S.C. 66, 190 S.E.2d 743 (1972).

11. For a thorough discussion of building permits in South Carolina, *see* Note, *The Building Permit and Reliance Thereon in South Carolina*, 21 S.C.L. REV. 70 (1968).

12. Charleston, S.C., Zoning Ordinances § 30.50.50.

13. Whitfield's actions consisted of preparing plans and specifications which were completed by August 3, 1971, and negotiating a contract for building materials signed on August 3, 1971.

him, . . . thereby acquiring a property right which could be protected . . . ."[14]

The precise question presented to the court in *Whitfield* concerned the effect of a valid, subsequent zoning ordinance on a building permit which had not become vested. In the past this jurisdiction has emphasized the purpose of, and the public interest protected by, the ordinance rather than the extent to which the permittee has relied on the permit.[15] The question was before the court in *Palmetto Petroleum, Inc. v. City of Mullins*,[16] but the court decided the case on other grounds. In *Whitfield* the court based its decision on the fact that appellant had not begun construction, stating, "Under the provisions of the ordinance in question, it was necessary for the appellant to show that *construction* . . . [had] actually commenced by August 15, 1971."[17] This reasoning coincides with the general rule followed in most jurisdictions that the permittee's rights under a subsequent zoning ordinance depend on whether his permit has become vested through affirmative action.[18] The court left open the question of exactly how much action a permittee would have to undertake in order for his property right to vest but suggested that the test is beginning physical construction.[19] Such a test is undesirable from the permittee-builder's point of view because it places a high premium on physical construction. A builder necessarily has to make tentative commitments and preliminary contracts which would not be sufficient to protect his permit under the court's test; yet the breach of these commitments would undoubtedly injure the builder's business.

B. Restrictive Covenants

Finucan v. Coronet Homes, Inc.,[20] concerned the enforcement of restrictive covenants on residential property. Plaintiffs were the owners of lots in a subdivision known as Millwood that originally contained thirty-eight lots. The recorded restrictions

14. 259 S.C. at 70, 190 S.E.2d at 745.

15. *See* Douglass v. City Council, 92 S.C. 374, 75 S.E. 687 (1912).

16. 251 S.C. 24, 159 S.E.2d 854 (1968),

17. 259 S.C. at 70, 190 S.E.2d at 745 (emphasis added).

18. 1 E. YOKLEY, ZONING LAW AND PRACTICE § 9-5, at 407 (3d ed. 1965).

19. 259 S.C. at 71, 190 S.E.2d at 745, *citing* Town of Hillsborough v. Smith, 276 N.C. 48, 170 S.E.2d 904 (1969).

20. 259 S.C. 142, 191 S.E.2d 5 (1972).

limited the application of the covenants to the platted lots and "expressly declared that they should not affect the other land of the developer."[21] The dispute arose when lots were added to the development and a second plat of Millwood, with identical restrictions, was filed. The second plat included the original thirty-eight lots, although they were not set off in lots and blocks. The new restrictions declared that they would be binding on all persons claiming in the "development known as 'Millwood'."[22] The plaintiffs, owners in the original subdivision, attempted to enforce the new restrictions, but the lower court held that the restrictions imposed by the second instrument were not intended for the benefit of the plaintiffs. The supreme court reversed, stating that there was no intention on the part of the developer to create two separate subdivisions subject to different plans for development. The court interpreted the original restriction limiting the application of the covenants to the platted lots as a safeguard to the developer from any claim that his remaining lands had become burdened by the restrictions on Millwood.

Heffner v. Litchfield Golf Co.[23] involved a homeowner's attempt to prevent the defendant Litchfield from building tennis courts on two adjacent lots. Litchfield was the common grantor of a subdivision which contained no restrictions on the recorded plat. Each conveyance in the subdivision including plaintiff's contained a list of restrictions, the first of which limited the lots to residential use. The twentieth provision read:

> It is understood and agreed that these covenants, conditions and restrictions are made solely for the benefit of the Grantor and Grantee herein and may be changed at any time by mutual consent in writing of the parties hereto, their heirs, successors or assigns.[24]

The proposed tennis courts were to be built on two lots previously conveyed by Litchfield but thereafter reacquired. The court seized on this fact to declare that appellants had no standing to enforce the restrictions against Litchfield because Litchfield stood simultaneously as grantor and grantee of the two lots and could modify or rescind the restrictions at its discretion.

21. *Id.* at 144, 191 S.E.2d at 6.
22. *Id.* at 145, 191 S.E.2d at 6.
23. 258 S.C. 447, 189 S.E.2d 3 (1972).
24. *Id.* at 449, 189 S.E.2d at 4.

Appellants, however, contended that Litchfield had inaugurated a general residential scheme which appellants had relied upon, thereby creating reciprocal negative easements by implication.[25] In rejecting this argument, the court stressed that mutuality of covenant and consideration, essential to the existence of a general scheme of development, can only be implied when the common grantor manifests his intention to subject the parcels conveyed to common restrictions for the benefit of all grantees. By the express terms of the restrictions, the benefits of each were limited to the parties thereto, precluding any implication that the grantor intended to create restrictions for the benefit of all purchasers in the subdivision.[26]

III. NAVIGABLE WATERS

Two cases decided during the survey period concerned navigable waters and, more specifically, South Carolina's claim to all the state's tidelands, the area between the mean high and low water marks on tidal, navigable waters. In *State v. Hardee*[27] Claire D. Hardee was enjoined from trespassing upon, filling, or otherwise changing that portion of her property constituting tidelands adjacent to Salt Creek at Pawleys Island. The state claimed title to these tidelands, conceding to Mrs. Hardee only the land lying above the high water mark, or about one-third of her original purchase. Appellant Hardee denied the state's allegation of ownership and claimed title to all the land down to the low water mark. Her claim was based on a grant made in 1842 by the State of South Carolina to Col. Peter Frazier, appellant's predecessor in title.

The state admitted the validity of the Frazier grant so the

25. Easterly v. Hall, 256 S.C. 336, 182 S.E.2d 671 (1971); Edwards v. Surratt, 228 S.C. 512, 518-19, 90 S.E.2d 906, 909 (1956) stated the doctrine:

> [W]here a common grantor opens a tract of land to be sold in lots and blocks, and, *before any lots are sold* (emphasis ours), inaugurates a general scheme of improvement for the entire tract intended to enhance the value of each lot, and each lot, subsequently sold by such grantor, is made subject to such scheme of improvement, there is created and annexed to the entire tract what is termed a negative equitable easement, in which the various purchasers of lots have an interest, and between whom there exists mutuality of covenant and consideration.

26. *See generally* 20 AM. JUR. 2d *Covenants, Conditions, and Restrictions* § 178 (1965).

27. 193 S.E.2d 497 (S.C. 1972) (3-2 decision).

only issue was whether appellant could prove good title to the land down to the usual low water mark. The supreme court unanimously held that appellant had failed, finding nothing in her deed or plat to indicate that her boundary was to extend below the high water mark. The bases for the court's decision are two common law rules of construction applied to grants by the sovereign:

> When a body of land is bounded by . . . a tidal navigable stream, the boundary line is the high water mark, in the absence of more specific language showing that it was intended to go below high water mark, and the portion between high and low water mark remains in the State in trust for the benefit of the public.
>
> A deed or grant by the State of South Carolina is construed strictly in favor of the State and general public and against the grantee.[28]

Applying these rules, the court requires a private claimant to prove by specific language in the deed or plat the state's intent to grant title beyond the high water mark.[29] Because the appellant in *Hardee* could not meet this burden of specificity, the state prevailed.

Although it was unnecessary to the holding of the case, the court considered the question of whether title to all tidelands is held by the state.[30] The majority adopted the controversial language of *Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co.*[31] that "[t]he title to land below high-water mark on tidal navigable streams, under the well settled rule, is in the State, not for the purpose of sale, but to be held in trust for public purposes."[32] This quotation has been correctly

28. *Id.* at 499, *citing* Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co., 148 S.C. 428, 146 S.E.434 (1928) (construction favors the state); State v. Pacific Guano Co., 22 S.C. 50 (1884) (boundary is the high water mark).

29. 193 S.E.2d at 501.

30. The majority misstated the case when it said that the state "alleges the ownership of all tidelands in South Carolina . . . ." 193 S.E.2d at 497. The state actually only claimed to be "owner of all tidelands, submerged lands and waters within the Pawley's Island area of Georgetown County, South Carolina . . . which are the subject of this action." Record at 5.

31. 148 S.C. 428, 146 S.E. 434 (1928). The rule was reaffirmed in Rice Hope Plantation v. South Carolina Pub. Serv. Authority, 216 S.C. 500, 59 S.E.2d 132 (1950).

32. 148 S.C. at 428, 146 S.E. at 438.

characterized as a dictum,[33] although the State Attorney General has consistently maintained that it accurately states the law.[34]

The majority, while adhering to *Cape Romain*, did not make clear what meaning or effect the controversial language portends. Taken literally, the quotation indicates that all tidelands are owned by the state and may not be alienated by it. However, because the majority in *Hardee* actually rested its decision on the absence of a specific grant, all other pronouncements not clearly embraced by that rationale are dicta. Moreover, though the court reaffirmed *Cape Romain*, it did so subject to this caveat quoted from *Rice Hope Plantation v. South Carolina Public Service Authority*:[35] "But we do not deem it necessary or proper upon this appeal to determine under what circumstances and by what method, if any, title might be acquired by private owners . . . ."[36] The majority also quoted with approval from a law review article in which the authors reasoned that grants of tidelands are to be strictly construed but are not necessarily precluded by *Cape Romain*.[37] Thus, at present, the court has not accepted the argument that tidelands are held in public trust and may not be granted to private owners.

Emphasizing that point, Justice Bussey, joined by Justice Brailsford, concurred in the result in a separate opinion. Justice Bussey distinguished between tidelands and submerged lands, maintaining that "in this jurisdiction it is the 'submerged lands' and *not 'tidelands'*, which have traditionally been held in trust by the sovereign."[38] This conclusion, though perhaps historically correct, ignores the expansion of the theory of navigability. *Cape Romain* may indicate that, as waters other than stream beds came to be considered legally navigable, the concept of submerged lands tacitly but completely absorbed the concept of tide-

33. Logan & Williams, *Tidelands in South Carolina: A Study in the Law of Real Property*, 15 S.C.L. REV. 657, 667 (1963); Horlbeck, *Titles to Marshlands in South Carolina*, 14 S.C.L.Q. 288, 353 (1962) (parts 1 & 2); *cf.* Clineburg & Krahmer, *The Law Pertaining to Estuarine Lands in South Carolina*, 23 S.C.L. REV. 7, 22 (1971).

34. *See, e.g.*, [1970] S.C. REP. ATT'Y GEN. 329 (No. 3040). The Attorney General has repeatedly expressed the view that title to all tidelands is prima facie in the state and excluded from private ownership, excepting those tidelands previously conveyed to individuals by the Crown of England, the Lords Proprietors, or the state by specific grant.

35. 216 S.C. 500, 59 S.E.2d 132 (1950).

36. 193 S.E.2d at 500, *quoting* 216 S.C. at 530, 59 S.E.2d at 145.

37. Clineburg & Krahmer, *The Law Pertaining to Estuarine Lands in South Carolina*, 23 S.C.L. REV. 7, 23 (1971).

38. 193 S.E.2d at 504.

lands.[39] Unfortunately, the majority's unfocused discussion leaves this and other questions unanswered.

State v. Murrell's Inlet Camp & Marina, Inc.,[40] involved title to two acres of salt marsh that the defendant had filled to the height of his contiguous land. The state claimed the land as owner of all lands lying between the mean high water mark and the mean low water mark in the Murrell's Inlet area. The defendant answered that the land in question was above the normal high water mark on the Atlantic Ocean and was therefore not tideland.[41] By stipulation the only issue submitted to the jury was whether or not the two acres were covered by the waters of the normal high tide. Apparently, an equal number of credible witnesses was presented by both parties in support of their positions. In sustaining the jury verdict for the defendant the supreme court, without citing authority, stated that this was a question of fact and peculiarly within the province of the jury.

IV. BOUNDARIES

Gethsemane Baptist Church v. Nut & Bolt House, Inc.,[42] concerned a dispute as to the correct boundary separating plaintiff's eight-acre tract from defendant's four acres. Plaintiff took the position that key calls in two senior deeds correctly established the disputed border. Defendant alleged that the calls in plaintiff's deeds were erroneous and that a 1915 deed and survey in its (defendant's) chain of title had described the correct boundary. Defendant's position depended upon whether the 1915 survey had been made in reference to certain monuments called for at the corners of the disputed boundary line. The monuments had disappeared and their original location could not be determined. The county court gave controlling weight to defendant's 1915 survey, apparently on the assumption that the survey had located the disputed corners. The supreme court reversed, finding no reference to monuments, stone or otherwise, in defendant's 1915 survey at the crucial corners.

The court reiterated the established rule in South Carolina that erroneous calls for courses and distances to stone monuments

39. *Cf.* Clineburg & Kramer, *The Law Pertaining to Estaurine Lands in South Carolina*, 23 S.C.L. REV. 7, 17-18 (1971).

40. 259 S.C. 404, 192 S.E.2d 199 (1972).

41. *Id.* at 406, 192 S.E.2d at 200.

42. 259 S.C. 92, 190 S.E.2d 748 (1972).

referred to in deeds must yield to the actual position of the monuments on the ground.[43] However, if the monument itself has disappeared and its original location remains undetermined, South Carolina law is in accord with the general rule that corners must be established by reference to the descriptive calls in senior deeds.[44] The court also speculated about the probative weight of a junior conveyance that *specifically* contradicts the calls of a senior conveyance as to the location of a lost monument, and recognized that other jurisdictions give priority to the senior conveyance.[45]

A per curiam opinion disposed of the appeal in *Brunson v. Graham*,[46] in which plaintiff sought a declaratory judgment to determine the true owner of a disputed tract of land. The controversy arose after plaintiff proceeded to subdivide a newly purchased 103 acre tract. Plaintiff then learned that one Wallace claimed a portion of the tract.[47] The supreme court found that appellant Wallace's claim to the disputed property was based on nothing more than where he thought his northern and western boundaries were located. Appellant's claim to 5.46 acres appeared even more frivolous because his chain of title consistently described his tract as containing "two (2) acres, more or less." The lower court held that since there was no competent evidence as to the location of appellant's boundary the court was obliged to fix the line in the most equitable manner.[48] Not surprisingly, the supreme court found nothing inequitable about limiting appellant's claim to two acres.

V. MISCELLANEOUS

Cohen v. Blessing[49] was an action for fraud and deceit brought by the purchaser to recover damages from the vendor for the sale of a dwelling house infested with termites. This case indicates that the court is continuing in the direction charted by

43. *Id.* at 97, 190 S.E.2d at 750, *citing* Nelson v. Frierson, 1 McCord 232 (S.C. 1821).

44. 259 S.C. at 97, 190 S.E.2d at 750. *See generally* 11 C.J.S. *Boundaries* § 8 (1938).

45. Coffey v. Greer, 241 N.C. 744, 86 S.E.2d 441 (1955).

46. 259 S.C. 298, 191 S.E.2d 713 (1972).

47. Judge McGowan of the Civil Court of Florence County decreed that Wallace had a valid claim to only two acres. Only Wallace appealed.

48. Knotts v. Knotts, 191 S.C. 253, 1 S.E.2d 809 (1939).

49. 259 S.C. 400, 192 S.E.2d 204 (1972).

Lawson v. Citizens & Southern National Bank.[50] Cohen brought two actions against Blessing—the first for fraudulent concealment of a latent defect in the residence and the second for breach of an implied warranty that the residence was fit for habitation. In reversing the lower court ruling, the court said that the better reasoned recent cases have imposed a duty on the seller of real estate to disclose termite or insect infestation "in the property known to him, but unknown to, and not readily observable upon reasonable inspection by the purchaser."[51] The court dismissed plaintiff's second cause of action for breach of warranty, applying the well settled South Carolina rule that there is no implied warranty of fitness in a sale of real estate by an owner-occupant.[52]

In *Shaw v. Still*[53] the plaintiff brought an action *ex delicto* against the landlords of a house for injuries sustained when plaintiff fell on a defective step. The plaintiff had gone to the home of the tenant for the purpose of employing him and fell as she left the house. Defendants alleged that the complaint failed to state facts sufficient to constitute a cause of action *ex delicto* as to them. The court dismissed the case on the authority that "[a]n action *ex delicto* will not lie for the breach of a mere contractual duty to repair because a tort is civil wrong other than a breach of contract . . . ."[54] The *Shaw* rationale is consistent with that adopted by the majority of courts. A sizable minority, however, has held a lessor's breach of an agreement to repair sufficient grounds for finding him liable to his tenant, or someone in privity with the tenant, if the failure to repair was a contributing cause of the injury.[55]

WAYNE WILLIS

50. 255 S.C. 517, 180 S.E.2d 206 (1971). *See generally* 37 AM. JUR. 2d *Fraud and Deceit* § 158 (1968).

51. 259 S.C. at 403, 192 S.E.2d at 205-06, *quoting* Annot., 22 A.L.R.3d 972, 977 (1968).

52. Frasher v. Cofer, 251 S.C. 112, 160 S.E.2d 560 (1968); *accord*, Lessly v. Bowie, 27 S.C. 193, 3 S.E. 199 (1887). *See also* Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970) (sale by a builder-vendor).

53. 259 S.C. 377, 192 S.E.2d 206 (1972).

54. Sheppard v. Nienow, 254 S.C. 44, 49, 173 S.E.2d 343, 345 (1970).

55. *See* Annot., 78 A.L.R.2d 1238 (1961), for decisions holding a landlord liable for personal injuries resulting from the breach of an agreement to repair. The American Law Institute has adopted the minority view. RESTATEMENT (SECOND) OF TORTS § 357, at 241 (1965).