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Constitutional Law

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CONSTITUTIONAL LAW

I. Liquor Regulation

In *Pirates' Cove, Inc. v. Strom*,[1] another effort was made to untie South Carolina's Gordian knot of liquor laws. As expected, the attempt failed. The issue, as defined by the court, was "whether one may lawfully sell legally acquired alcoholic liquors in South Carolina, or have the same in possession for sale, without a license from the State to do so."[2]

The plaintiffs' argument was a three-step process beginning with *State v. McMaster*.[3] There the South Carolina Supreme Court found that when a purely private club furnished liquor, paid for out of the general club funds, to its members, no sale was consumated. In 1907 a statute[4] was passed which voided the *McMaster* decision. This statute was carried over in substance in the South Carolina Code[5] until 1956 when it was repealed.[6] The plaintiffs, in essence, maintained that by repealing the 1907 statute the *McMaster* ruling was reinstated. The court felt this claim did not warrant discussion because South Carolina Code Section 4-91[7] was broad enough to prohibit plaintiffs' activities.[8] Also, the court distinguished this case from the *McMaster* case by ruling that whereas in the latter situation there was no sale and no *profit*, in this case a sale by the Pirates' Cove to its members resulted in a profit.[9]

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1. 249 S.C. 270, 153 S.E.2d 900 (1967).
2. *Id.* at 274, 153 S.E.2d at 901.
3. 35 S.C. 1, 14 S.E. 290 (1892).
4. XXV S.C. Stats. At Large 463, 474 (No. 226, 1907). The applicable portion reads:

> It shall be unlawful for any club, company, association or corporaiton, or any chartered company now in existence, or hereafter to be incorporated, for social, literary, or other purpose, within this State, to buy, sell, keep for sale, exchange, barter, any liquor . . . for any purpose whatever, either to members or to other persons. . . .

5. S.C. Code Ann. § 4-97 (1952).
6. XLIX S.C. Stats. At Large 1992, 2007 (No. 820, 1956).
7. S.C. Code Ann. § 4-91 (1962) reads:

> It shall be unlawful for *any* person to manufacture, store, keep, receive, have in possession, transport, ship, buy, sell, barter, exchange or deliver any alcoholic liquors except liquors acquired in a legal manner, and except in accordance with the provisions of this chapter (emphasis added).

8. Pirates Cove, Inc. v. Strom, 249 S.C. 270, 275, 153 S.E.2d 900, 903 (1967).
9. *Id.*

A. *"Ho Ho Ho He He He Little Brown 'Bag' How I Love Thee."*[10]

The above ditty may have been sung by a happy "wet" upon the enactment of the "Brown Bagging" law.[11] The primary change wrought by this law affects the kinds of places a person may lawfully possess and consume alcoholic liquors. Although the state's constitutional prohibition of sales by the drink remains in force, the law does permit a person to carry his own legally acquired liquor into various licensed establishments and purchase setups with which to mix his drinks.

The "brown bagging" law seems to effect a temporary compromise between the "wets" and "drys" in the state. However, when two strong groups square off in seeking an opposite result, change is inevitable. Although momentarily subdued, it is doubtful if the liquor struggle is over in South Carolina.[12]

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10. Sung to the tune of "Little Brown Jug."

11. LV S.C. STATS AT LARGE 571 (No. 398, 1967). The key section of this statute is section 10 which, in part, reads:

> Section 10. When lawful to possess alcoholic liquors . . . .
> A. Notwithstanding any other provision of law, it shall be lawful, subject to the provisions of subsection B of this section, for any person who is at least twenty-one years of age to transport, possess or consume lawfully acquired alcoholic liquors in accordance with the following: . . . .
> (2) Any person may possess or consume alcoholic liquors:
> (a) in a private residence, hotel room or motel room;
> (b) or on any other private property not primarily engaged at that time in commercial entertainment and not open to the general public at the time when such person has obtained the express permission of the owner or person lawfully in possession of the property; *provided,* however, this shall not be construed to permit or in any way authorize the possession or consumption of alcoholic liquors on premises for which a permit is required pursuant to items (3) and (4) of this subsection.
> (3) Any member, or guest of a member, of a nonprofit organization with limited membership established for social, benevolent, patriotic, recreational or fraternal purposes may possess or consume alcoholic liquors on premises operated by such organization and not open to the general public, provided a permit has been issued to the organization for such premises by the Alcoholic Beverage Control Commission.
> (4) It shall be lawful for any person to possess or consume alcoholic liquors on the premises of any business establishment, except on Sunday, provided the establishment meets the following requirements:
> (a) The business is bona fide engaged primarily and substantially in the preparation and serving of meals or furnishing of lodging; and
> (b) The business has a permit . . . .
> B. It shall be unlawful for any person to possess or consume any alcoholic liquors upon any premises where such person has been forbidden to possess or consume alcoholic liquors by the owner, operator or person in charge of the premises.

12. For a review of liquor regulation in the state, see Hibbard, *A History of South Carolina Liquor Regulation,* 19 S.C.L. REV. 157 (1967).

II. "RE-REAPPORTIONMENT"

The case of *State ex rel. McLeod v. West*[13] declared that the 1966 fifty-member senate reapportionment plan[14] was invalid in that it violated the state's constitution.[15]

Since the United States Supreme Court in *Reynolds v. Sims*[16] held that both houses of a state's bicameral legislature must be apportioned on a population basis in order to fulfill the equal protection requirement of the fourteenth amendment, practically every state except one[17] has had to shuffle senators and senatorial districts into an acceptable pattern. *O'Shields v. McNair*[18] was the signal which marked South Carolina's entry into the race to redistrict.

By interpretative legerdemain, our court has managed to save a constitutional clause but in the process condemn a senate. The senate's death knell was sounded in the *West* decision wherein the court read *one* sentence in our constitution as having *two* meanings and then declared one meaning valid and the other invalid. Referring to article 3 section 6 of the South Carolina Constitution, the court stated:

> This pithy section was skillfully drafted to accomplish two relevant objectives, i.e., to fix the numerical composition of the Senate as equivalent to the number of counties and to apportion the members on the basis of one senator from each country. The second of these objectives has been stricken for conflict with federal law. The first is not subject to challenge on this ground, and is valid unless it must fall with the second. The issue turns on whether the valid is severable from the invalid without perversion of its meaning.[19]

The court went on to hold that the meanings were severable and that the valid portion required South Carolina's senate to be

13. 249 S.C. 243, 153 S.E.2d 892 (1967).
14. LIV S.C. STATS. AT LARGE 2016 (No. 743, 1966).
15. S.C. CONST. art. 3, § 6 provides:
The Senate shall be composed of one member from each County, to be elected for the term of four years . . . .
16. 377 U.S. 533 (1964).
17. Nebraska has a unicameral legislature.
18. O'Shields v. McNair, 254 F. Supp. 708 (D.S.C. 1966).
19. State *ex rel.* McLeod v. West, 249 S.C. 243, 246, 153 S.E.2d 892, 893 (1967).

composed of neither more nor less than 46 members, *at the present time.*[20]

The court in this decision relied on the New York case of *In re Orans*[21] involving a similar question in that the court was ruling on the constitutionality of a plan that would have increased the New York assembly over the one hundred and fifty members as required by that state's constitution. However, the section there in question specifically states that the assembly shall consist of one hundred and fifty members.[22] In other words, the New York case involved one section with one meaning, not one section with two meanings. Our court resolved this difference by saying of our section, "the difference is in form only, and the issue of severability is to be resolved upon substance."[23]

There is authority by which our court could have decided the *West* case differently. In *In re Advisory Opinion to the Governor*[24] the same question of whether the state constitution[25] limited the size of the legislature was presented. The Florida court found that the two federal court decisions[26] which declared Florida's apportionment unconstitutional also rendered invalid the size requirement of the legislature. Our court dispensed with this case by saying that it

> is not persuasive because the court simply construed a federal court judgment as having 'eliminated the limitations provided in the Florida Constitution on the size of the House and Senate,' without considering whether such limitations were severable from the apportionment provisions.[27]

20. On April 10, 1967, in response to a motion for a rehearing of this case, the court ruled that the fifty-man senate was a valid legislative body until the 1968 election. The court based its decision on the right of the state citizens to representation and said to deprive them of that right would run against an essential concept of the South Carolina Constitution. State *ex rel.* McLeod v. West, 249 S.C. 243, 248, 153 S.E.2d 892, 894 (1966).

21. 15 N.Y.2d 339, 258 N.Y.S. 825, 206 N.E.2d 854 (1965).

22. N.Y. CONST. art. 3, § 2.

23. State *ex rel.* McLeod v. West, 249 S.C. 243, 247, 153 S.E.2d 892, 894 (1967).

24. 150 So. 2d 271 (Fla. 1963).

25. FLA. CONST. art. 7, § 3. The pertinent part reads: "The legislature . . . shall apportion the Representation in the Senate, and shall provide for thirty-eight (38) Senatorial Districts . . . and each shall have one Senator."

26. Sobel v. Adams, 208 F. Supp. 316 (S.D. Fla. 1962).

27. State *ex rel.* McLeod v. West, 249 S.C. 243, 248, 153 S.E.2d 892, 894 (1967).

As a result of the *West* decision, which could have been decided either way, our court has seen fit to leave a change in the senate's size to the people via a constitutional amendment. For reasons hereinafter stated, no logical choice remains but to amend this section of our constitution. Indeed, the court in *O'Shields* seems to have anticipated this and recommended such a procedure.[28]

The first reason such a course is advisable lies in other sections of the state constitution relating to the formation of new counties. Factually speaking, our constitution does *not* require a forty-six member senate but rather requires a senator from each county.[29] It just happens that presently we have forty-six counties. The basic requirement for forming a new county as set out in the state constitution is:

> The General Assembly may establish new Counties in the following manner: Whenever one-third of the qualified electors within the area of each section of an old County proposed to be cut off to form a new County shall petition the Governor for the creation of a new County, setting forth the boundaries and showing compliance with the requirements of this Article, the Governor shall order an election, within a reasonable time thereafter, by the qualified electors within the proposed area, in which election they shall vote "Yes" or "No" upon the question of creating said new County; and at the same election the question of a name and a County seat for such County shall be submitted to the electors.[30]

The problem thus presented is as follows: the senate could be properly apportioned using the present number of forty-six. If

28. O'Shields v. McNair, 254 F. Supp. 708, 711 (D.S.C. 1966).

29. S.C. CONST. art. 3, § 6.

30. S.C. CONST. art. 7, § 1. The other sections of this article relating to the formation of new counties are:

§ 2. Requiring that if two-thirds vote 'yes' in the election, the General Assembly shall at the next session establish the new county.

§ 3. Requirements as to population—not less than one one-hundred and twenty-fourth parts of the total population of the state. As to taxable property—not less than one and one half million dollars. As to area—not less than four hundred square miles.

§ 4. As to the old county. It shall not be reduced to less than five hundred square miles and shall not be reduced in taxable property to less than two million dollars nor have less than fifteen thousand inhabitants.

§ 5. The new county line cannot be within eight miles of the old county's court house.

§ 14. No county line shall pass through any incorporated city or town.

a new county were formed, the number of persons represented by each of the forty-six senators could still be proper, *but* then the constitution would require forty-seven senators and the senate would be invalid again. Although this situation may not seem probable to many, how many thought that the South Carolina senate would have to be reapportioned according to population? Indeed, since the present constitution was adopted in 1895 ten new counties have been formed.[31]

A second reason a constitutional amendment is advisable is the growth patterns of the state. The more industrialized areas of the state are gaining in population much more rapidly than the rural areas. It is not inconceivable that in the future, if the senate's size remains fixed at forty-six, as many as four or five rural counties would have one senator to represent all of them. Such an arrangement may satisfy the federal requirement as to population, but it is easy to imagine the difficulties one person would have in adequately representing so large a geographical area.

As to what senate size a state deems best suited for its legislature, the Court in *Reynolds v. Sims*[32] stated:

> Determining the size of its legislative bodies is of course a matter within the discretion of each individual state. Nothing in this opinion should be read as indicating that there are any federal constitutional maximums or minimums on the size of state legislative bodies.[33]

Although the size of state legislative bodies is left to the states, the method of apportionment is very much a federal concern and it is only hoped that South Carolina can formulate an acceptable plan before the federal court undertakes the task itself.[34]

III. CIVIL RIGHTS

In the cases of *Williams v. Sumter School District Number 2*[35] and *Rackley v. School District Number 5 of Orangeburg*,[36] sub-

31. O'Shields v. McNair, 254 F. Supp. 708, 716 (D.S.C. 1966).

32. 377 U.S. 533 (1964).

33. *Id.* at 581 n.63.

34. For recent articles pertaining to reapportionment in South Carolina see 18 S.C.L. REV. 886 (1966) and 19 S.C.L. REV. 6 (1967).

35. 255 F. Supp. 397 (D.S.C. 1966).

36. 258 F. Supp. 676 (D.S.C. 1966). The plaintiff in this case was also the plaintiff in the case which led to the de-segregation of the Orangeburg Hospital. *See* Rackley v. Board of Trustees, 238 F. Supp. 512 (D.S.C. 1965).

stantially the same question was involved. In both cases, the plaintiff-teachers' contracts were not renewed, as the court ruled, by reason of their civil rights activities.

The qualifications of the plaintiffs and their classroom conduct were above reproach and termed excellent.[37] However, both were extremely active in civil rights activities within their respective communities.

Ruling in the *Williams* case the court stated:

> The action of the Sumter Board was, is, arbitrary, capricious, without constitutional foundation, and beyond constitutional authority. It is obvious that plaintiff was refused, denied, reemployment because of her civil rights activity.[38]

The court, while recognizing the powers of school administrators in this area, stated in *Rackley:*

> This court is loathe to interfere or override any actions of a public administrative body in the exercise of its discretionary powers and functions except in the clearest of cases.[39]

The court went on to describe the school board's action as follows:

> The court concludes that the board's action was based upon the exercise by plaintiff of her constitutionally protected rights and privileges. Her discharge by the board and its failure to rehire her were based upon improper, illegal and constitutionally proscribed considerations, which resulted in an unwarranted and discriminatory exercise of its discretionary powers.[40]

The court had ample authority for its decisions. Both cases cited the North Carolina case of *Johnson v. Branch.*[41] This case involved the same factual pattern as the two cases now under discussion. The same decision was reached.

The Supreme Court has not been silent in regard to the involvement of teachers in controversial activities. In the 1967

37. As to comments about their respective qualifications *see* Rackley v. School Dist. No. 5, 258 F. Supp. 676, 679 n.2 (D.S.C. 1966) and Williams v. Sumter School Dist. No. 2, 255 F. Supp. 397, 398 (D.S.C. 1966).

38. Williams v. Sumter School Dist. No. 2, 255 F. Supp. 397, 398 (D.S.C. 1966).

39. Rackley v. School Dist. No. 5, 258 F. Supp. 676, 684-85 (D.S.C. 1966).

40. *Id.* at 685.

41. 364 F.2d 177 (4th Cir. 1966).

case of *Keyishian v. Board of Regents*,[42] the Supreme Court held certain sections of the New York loyality program to be unconstitutional. In so doing, the Court ruled that members of the Communist party who did not share its unlawful aims and did not have the specific intent to overthrow the government by force or violence could not be barred from teaching in the public school system.

As a result of the *Keyishian* case the question as to the two teachers here involved may be answered as follows, If a Communist can teach in a public school system, surely a civil rights leader has the same privilege.[43]

IV. ELECTIONS

The case of *State ex rel. Thornton v. Wannamaker*[44] presented the question of whether or not the defendant had a right to have his name printed as a nominee on the official ballot for the 1966 general election as a candidate by petition for the office of State Treasurer.

The question came up by reason of the death of the Democratic Party's nominee, Mr. Jeff Bates, in August of 1966, and the resulting vacancy in the office of State Treasurer. The office was filled by appointment under state law[45] and the Democratic Party chose another nominee. The propriety of this procedure was not questioned. Mr. Wannamaker's name was submitted by petition to the Secretary of State on September 8, 1966. The court held that the filing of the petition was not timely and that defendant was not entitled to have his name printed on the ballot.

The defendant made a two-pronged argument which was dispatched by the court with little effort. First he attacked the constitutionality of the applicable election law amendment of 1964. The court answered by noting that even if the amendment

42. 87 S. Ct. 695 (1967). This case is discussed in 19 S.C.L. REV. 422 (1967).

43. The general power to discharge a teacher in South Carolina is found in S.C. CODE ANN. § 21-230 (1962) which reads as follows:

> General powers and duties of school trustees—
> The board of trustees shall also: . . .
> (2) *Employ and discharge teachers.* Employ teachers . . . and discharge them when good and sufficient reasons for so doing present themselves; subject to the supervision of the county board of education. . . .

44. 248 S.C. 421, 150 S.E.2d 607 (1966).

45. S.C. CODE ANN. §§ 1-2, 1-222 (1962). The latest changes in the election laws can be found in LIV S.C. STATS. AT LARGE 2340, (No. 971, 1966).

were not valid the petition would have been late under the law as it stood prior to the amendment.[46]

The second argument was that the election was one to fill a vacancy in the office, whereas the statute related to an election to fill a term of office.[47] The court retorted as follows:

> The method of filling an unexpired term in the office of State Treasurer is prescribed by Sections 1-2 and 1-222 of the 1962 Code of Laws, which, when properly construed together, clearly authorize the Governor to appoint until the meeting of the next General Assembly, at which time the General Assembly would elect a State Treasurer to serve the remainder of the unexpired term. Upon the death of Mr. Bates on August 17, 1966, the Governor made an appointment . . . .
>
> There is therefore no vacancy in the office of State Treasurer to be filled at the General Election . . . . Instead, the election is one to fill the next term . . . to which the election statutes clearly apply.[48]

Upon an examination of the case and the statutes involved one can readily see that the court was correct in its decision.

V. CONFLICTS

Locklair v. Locklair[49] involved the question of whether a South Carolina wife could sue her husband, also a state resident, for injuries sustained in an automobile accident in Georgia.

The facts in this case are similar to those in 1964 case of *Oshiek v. Oshiek*[50] in which our court followed the traditional conflicts theory of lex loci delicti. In the *Oshiek* case Georgia law was held to apply, and, since that state still follows the doctrine of inter-spousal tort immunity,[51] recovery was denied.

Cognizant of her husband's immunity, the plaintiff-wife in *Locklair* brought suit in the federal courts alleging that to disallow her suit would be a denial of equal protection under the

46. State *ex rel.* Thornton v. Wannamaker, 248 S.C. 421, 428, 150 S.E.2d 607, 610 (1966).

47. *Id.* at 428, 150 S.E.2d at 610.

48. State *ex rel.* Thornton v. Wannamaker, 248 S.C. 421, 429, 150 S.E.2d 607, 610 (1966).

49. 256 F. Supp. 530 (D.S.C. 1966).

50. 244 S.C. 249, 136 S.E.2d 303 (1964).

51. GA. CODE ANN. § 53-501 (1961).

Federal Constitution. The court answered this novel claim by stating:

> Moreover, there is no discrimination nor denial of equal protection of the laws insofar as plaintiff is concerned, inasmuch as the Georgia law applies equally to husbands as well as to wives. If a wife negligently or recklessly injures her husband, he likewise has no cause of action against her under the Georgia decisions. Eddleman v. Eddleman, 183 Ga. 766, 189 S.E. 833 (1937).[52]

The court, in effect, said in this decision that South Carolina has chosen to retain the lex loci delicti rule and the federal court is bound by that choice.[53]

VI. MILK REGULATION

In the case of *Richbourg's Shoppers Fair, Inc. v. Stone*[54] the South Carolina Supreme Court followed its prior decisions[55] in this field and ruled the 1965 milk pricing scheme[56] unconstitutional.

This case and a history of milk regulation in South Carolina is the subject of an extensive note recently published in the South Carolina Law Review.[57] As pointed out in that article, although the 1965 statute was declared unconstitutional, South Carolina still has milk price fixing at all levels by reason of the yet unchallenged 1966 act.[58] This statute was originally to last for a maximum period of only 380 days but was recently extended[59] to remain effective until June 1, 1968. The question is whether the court will declare this law unconstitutional when and if it is challenged.

The legislature, in drafting the 1966 law, has attempted to analyze the court's reasons for declaring the earlier acts uncon-

52. Locklair v. Locklair, 256 F. Supp. 530, 533 (D.S.C. 1966).

53. *Id.* For discussion of the *Oshiek* case, *see* 17 S.C.L. REV. 305 (1965). For other articles concerning this problem in South Carolina *see* 18 S.C.L. REV. 453 (1966) and 18 S.C.L. REV. 880 (1966).

54. 249 S.C. 278, 153 S.E.2d 895 (1967).

55. The court also held milk price fixing schemes unconstitutional in Gwynette v. Myers, 237 S.C. 17, 115 S.E.2d 673 (1960) and Stone v. Salley, 244 S.C. 531, 137 S.E.2d 788 (1964).

56. LIV S.C. STATS. AT LARGE 528 (No. 297, 1965).

57. 19 S.C.L. REV. 389 (1967).

58. LIV S.C. STATS. AT LARGE 2847 (No. 1165, 1966).

59. LV S.C. STATS. AT LARGE 1173 (No. 614, 1967).

stitutional and counter them in the preface of the 1966 act. (The preface is two pages in length whereas the act itself is only a page and a half.) The following facts and statements are found in those introductory remarks: that the public health and welfare is being endangered as a result of the price war which has forced 268 dairy farmers out of business since 1963; that the supply of fresh milk is being threatened by these practices and as a result the public health is being seriously endangered; that ninety percent of the milk sold in the free world is subject to some form of economic control; that milk is now affected with the public interest and that some form of economic control over milk is necessary in order to protect the public health and welfare; and that due to the manner in which milk is marketed, the farmer actually bears the risk of loss while having no control over the selling practices engaged in by the retailer.[60] Whether these statements will persuade the court to reverse its position remains to be seen. Outside of any constitutional considerations, the policy underlying the court's position can be found in the following statement made after drawing the analogy of milk production to meat production, growing and distributing grain and other food stuffs:[61]

> It has never been suggested in this state that the economic security of those engaged in them may be assured by legislative or bureautic price-fixing.[62]

It seems the court fears that if it opens the door to price fixing in the milk industry, that the general food industries of the state will clamor for a similar protection and thus create "socialized eating."

VII. "TAKING" OF PRIVATE PROPERTY

In *Kline v. City of Columbia*,[63] the plaintiff's property was damaged as a result of an explosion caused when a gas line was ripped open while the defendant was engaged in widening a street. One of the issues[64] raised by the city in its demurrer was whether or not a cause of action was stated under the constitu-

60. LIV S.C. STATS. AT LARGE 2847, 2848 (No. 1165, 1966).

61. Gwynette v. Myers, 237 S.C. 17, 30, 115 S.E.2d 673, 679 (1960).

62. *Id.* at 30, 115 S.E.2d at 680.

63. 155 S.E.2d 597 (S.C. 1967).

64. As to the issue of whether a cause of action had been stated under the statute, S.C. CODE ANN. § 46-70 (1962) and as to the asserted misjoinder of actions, *see Practice and Procedure* in this survey.

tion.[65] The city relied on *Collins v. City of Greenville*[66] wherein the act complained of was the alleged negligence of a city employee in unclogging a sewer line which resulted in sewage being backed onto plaintiff's premises. Recovery was denied in the *Collins* case. The court distinguished this latter case from *Kline* on the ground that in *Kline* the city was engaged:

> [I]n the affirmative, aggressive, and positive act of improving and widening a public street for public use. It was engaged in the exercise of a power ordinarily, though not necessarily, exercised under the power of eminent domain. In the Collins case the city was not engaged in any such aggressive and positive act.[67]

Whether or not this distinction is valid becomes questionable upon a further examination of the court's opinion in the *Kline* case. The following statement is made, "[t]his court has previously adopted and adhered to the broadest possible view of what is a taking and has construed the least actual 'damage' to be a 'taking.' "[68] Within this spirit, the court has allowed recovery where dangerous fumes were created by the improper maintenance of a city slaughter house[69] and for disagreeable odors emanating from an incinerator installed by the city.[70] It is hard to see the difference between the latter cases and the present case and the *Collins* case. The court may have been influenced by the continuing nature of the fumes and odors as opposed to the temporary nature of the standing sewage in *Collins*. However, the damage in the *Kline* case was not any more permanent than in *Collins*, just more extensive. When the court spoke of the city's widening the street as being akin to eminent domain, did it intimate that had the city merely been *repairing* the street and caused the explosion recovery would have been denied? Such an implication is doubtful.

The real reason for the *Kline* decision can be found in *Collins*, wherein the court, discussing this constitutional provision stated, "It was never intended to furnish a cause of action for every

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

66. 233 S.C. 506, 105 S.E.2d 704 (1958).

67. Kline v. City of Columbia, 155 S.E.2d 597, 599 (S.C. 1967).

68. *Id.*

69. Derrick v. City of Columbia, 122 S.C. 29, 114 S.E. 857 (1922).

70. Kneece v. City of Columbia, 128 S.C. 375, 123 S.E. 100 (1923).

error of judgment committed or wrongful act perpetrated by a town council."[71] It seems the court feels that as a practical matter a line has to be drawn somewhere in these cases and the question thus becomes one of degree.

VIII. CRIMINAL LAW

The defendant in *State v. Swilling*[72] sought reversal of a death sentence received in his second trial, after the first conviction was overturned. Among the grounds relied upon by the defendant[73] were prejudicial news comments and failure to sequester the jury. After discussing the news accounts the court stated:

> The record contains no affirmative showing of prejudice to the defendant from the newspaper publicity during the trial. It is not shown that any juror actually read the news articles in question. Assuming however that the jurors probably read the newspapers, there is a total absence of any showing of actual prejudice to the defendant therefrom. The newspaper articles were not such as to automatically preclude a fair trial and, under the circumstances, prejudice will not be presumed.[74]

The court, without actually saying so, seems to have recognized that there must be a balance obtained between the right of a free press and the right to a fair trial. In this case, the court struck this balance effectively. If the court had ruled in favor of the defendant in this case, it would have proven very difficult to report on any criminal trial in the state. Consequently, there would have been a trend in the direction of returning to the secret hearings of the Star Chamber. It was, after all, the intention of the framers of the first amendment to insure that such secrecy would not occur when they included freedom of the press in the first amendment.

As to whether defendant was prejudiced by the fact that the jurors were not sequestered the court ruled that this is a matter, "left to the sound discretion of the trial judge . . . [and] the

71. Collins v. City of Greenville, 233 S.C. 506, 511, 105 S.E.2d 704, 707 (1958). Ed. note. An out of court settlement has been reached in this case.

72. 155 S.E.2d 607 (S.C. 1967).

73. For further consideration of this case *see* the *Criminal Law and Procedure* section of this survey.

74. 155 S.E.2d 607, 612 (S.C. 1967).

action thereabout will not be upset except upon a clear showing of abuse of such discretion."[75] The court further stated:

> In the absence of a showing of prejudice, "we must assume that each and every member of the jury sought honestly and impartially, under the law, to discharge his duty, and that he observed the oath required of a juror."[76]

The court merely followed the general rule that the burden of establishing prejudice rests upon the defendant in cases such as this and that it is not the state which must prove that a fair trial was given but the defendant who must show that it was denied.[77]

IX. SPECIAL TAXES

In the case of *Newton v. Hanlon*[78] certain property owners attacked the constitutionality of a statutory scheme empowering the St. Andrews Public Service District in Charleston County to levy an assessment in the construction of a sewer system.[79]

The crux of the complaint was that the proposed frontage assessment was imposed on owners whose property abutted the proposed sewage collection laterals, but no assessment was made on owners of properties which were unimproved and were not platted to be used as commercial or residential subdivisions.

The court upheld the proposed method of assessment stating:

> All that is required of [a method of assessments] by constitutional law is that they apportion the burden of assessments with approximate equality, upon a reasonable basis of classification, and with due regard to the benefits to the individual property owners and the requirements of the public health, safety or welfare.[80]

In the case of *Stackhouse v. Floyd*,[81] the plaintiffs attacked the validity of a Dillon County constitutional amendment

75. *Id. quoting from* State v. Williams, 166 S.C. 63, 164 S.E. 415 (1932).
76. 155 S.E.2d 607, 612-13 (S.C. 1967).
77. Sheppard v. Maxwell, 384 U.S. 333, 352 (1966) (dictum).
78. 248 S.C. 251, 149 S.E.2d 606 (1966).
79. LIV S.C. STATS. AT LARGE 718 (No. 397, 1965) is a general statute empowering all special purpose districts exercising power to construct and operate sewer facilities. LIV S.C. STATS. AT LARGE 1064 (No. 535, 1965) gives the St. Andrews Commission its authority to act.
80. Newton v. Hanlon, 248 S.C. 251, 264, 149 S.E.2d 606, 613 (1966).
81. 248 S.C. 183, 149 S.E.2d 437 (1966).

authorizing the issuance of school bonds. Their contentions were based on two grounds. First, they asserted that the question as proposed and ratified by the legislature differed materially from that submitted to the voters and hence the amendment had not been validly adopted in accordance with article XVI of the South Carolina Constitution. Secondly, they contended that the election in regard to the amendment was improper in that the proposed amendment was not conspicuously posted at each voting precinct. The proposed amendment, and that voted upon by the General Assembly read:

> Provided that Dillon County may incur bonded indebtedness for school purposes in an amount not exceeding fifteen percent of the assessed value of all taxable property in the county, and such indebtedness shall not be considered in determining the aggregate debt limitation imposed by this section.[82]

The amendment submitted to the voters read:

> To permit Dillon County to incur bonded indebtedness for school purposes in an amount not exceeding fifteen percent of the assessed value of all taxable property within the County, *and to exclude such indebtedness from limitation* of aggregate indebtedness upon territory in the County.[83]

The court dispensed with the language difference by ruling that the same meaning was conveyed by both. The court stated that the amendment did meet the requirements of article XVI of the South Carolina Constitution and became a part thereof on February 10, 1965. In further commenting on the alleged language difference the court concluded:

> "[I]t is sufficient that [the form submitted to the voters] describe the amendment plainly, fairly, and in such words that the average voter may understand its character and purpose." The question submitted here meets these requirements.[84]

As to plaintiffs' contention that failure to post the proposed amendment was a fatal irregularity as to compliance with the election laws,[85] the court stated:

82. *Id.* at 191-192, 159 S.E.2d at 442.
83. *Id.* at 192, 149 S.E.2d at 442 (emphasis added).
84. *Id.* at 193, 149 S.E.2d at 443 (citations omitted).
85. S.C. CODE ANN. § 23-321 (1962).

> It is the ballot, not the posted notice, with which the voter comes into direct contact. The reasonable assumption is that he reads the question proposed on the ballot, and that his vote is cast on consideration of the question as so worded.[86]

The court went on to conclude, "[T]he failure to post the amendment . . . would have no such vital bearing on the proceedings as probably prevented 'a free and full expression of the popular will.' "[87]

Another objection raised by the plaintiffs was in relation to the manner in which the General Assembly provided for the funds to be allocated. In essence, the plan called for the funds to be distributed in the proportion that the pupil enrollment of each school district, as of the beginning of the 1964-1965 school year, bore to the total enrollment in the county. They complained that

> inequities in facilities exist among the school districts, that the needs of the several school districts are not in proportion to the respective per pupil enrollments and that the per pupil enrollments of the respective school districts are not in the same proportion as the assessed values of the respective school districts.[88]

The court answered this challenge by stating that it has long been a policy in South Carolina to tax the wealth where it is in order to educate the child where he is. The court concluded:

> [T]he method of apportionment provided by the legislature is not prohibited by any provision of the State or Federal Constitution but is on a basis well established in practice in this State . . . .[89]

X. Composition of Juries

In *Bostick v. South Carolina*,[90] the United States Supreme Court reversed the petitioner's conviction in a per curiam opinion citing only *Whitus v. Georgia*.[91] In the latter case, reversal of

86. Stackhouse v. Floyd, 248 S.C. 183, 194, 149 S.E.2d 437, 448 (1966).
87. *Id.*
88. *Id.* at 199, 149 S.E.2d at 446.
89. *Id.* at 202, 149 S.E.2d at 448.
90. 87 S. Ct. 1088 (1967).
91. 385 U.S. 545 (1967).

a conviction was rendered on the ground that it appeared that Negroes were systematically excluded from serving on juries. As a result of the *Bostick* decision, more Negroes will appear on both grand and petit juries in the state. In the state decision, testimony is found in which a conscious discrimination is denied.[92] If such is the case, rather than a random selection of jurors, an effort will have to be made to place some Negroes on the juries in the state.

By a constitutional amendment,[93] women may now serve on juries in the state.

XI. MISCEGENATION

The case of *Loving v. Virginia*[94] declared that state statutory and constitutional prohibitions on inter-racial marriages were void for conflict with the federal constitutional. As a result thereof, Article 3 Section 33 of the South Carolina Constitution and South Carolina Code Section 20-7 are null and void insofar as they relate to inter-racial marriages.[95]

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92. Bostick v. State, 247 S.C. 22, 28, 145 S.E.2d 439, 442 (1965). The following is an example of the questions and answers in the testimony:

> Q. Has the Commission to your knowledge ever made a conscious effort to place at least one Negro on the Grand Jury?
>
> A. No, because we draw them out and we let them hit as they fall. We don't keep rejecting whites until we get a Negro. We don't keep rejecting Negroes until we get a white.

93. LV S.C. STATS. AT LARGE 66 (No. 63, 1967) amending S.C. CONST. art. 5, § 22.

94. 18 L. Ed. 2d 1010 (1967).

95. A history of miscegenation laws in the United States and a review of the *Loving* case up to this decision can be found in 19 S.C.L. REV. 253 (1967).