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Constitutional Law

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CONSTITUTIONAL LAW

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Perhaps the most significant decisions rendered in the field of constitutional law during the period under review deal with the court's attempt to reconcile the individual's exercise of his constitutional freedoms with the community's duty to preserve law and order. These cases arise out of so-called "civil rights demonstrations" and "sit-ins." Also considered during the period under review were numerous other questions ranging from due process to special legislation. Several important constitutional questions were also decided in cases which are reviewed in the article dealing with public corporations.

I. BREACH OF PEACE DECISIONS

The 187 petitioners in the case of *Edwards* v. *South Carolina*[1] were convicted in a Magistrate's Court in Columbia, South Carolina, of the common law crime of breach of the peace. Their conviction was sustained by the Richland County Court and subsequently affirmed by the South Carolina Supreme Court in a unanimous decision by Mr. Justice Lewis.[2]

The South Carolina Supreme Court in affirming the conviction found that the acts of the appellants "under all the facts and circumstances clearly constituted a breach of the peace." These breach of the peace charges grew out of a "civil rights demonstration" held on March 2, 1961, in front of the State Capitol by a group of approximately 200 Negro college students including the petitioners. They had been arrested when, in the judgment of the police officers and municipal officials present, their conduct, which consisted largely of singing and parading with placards, reached the point of imminent violence after the "demonstrators" had failed to obey the orders of police officers to disburse in order to avoid violence and disorder upon the public streets and sidewalks. The petitioners then appealed to the United States Supreme Court which, in an opinion by Mr. Justice Stewart, reversed the convictions below in the decision under review.

The courts have for years grappled with the claims of the right to express unpopular ideas in public places as against

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1. 372 U.S. 229, 9 L. Ed. 2d 697 (1963).
2. State v. Edwards, 239 S.C. 339, 123 S.E.2d 247 (1961).

claims of an effective power in local government to keep the peace and to protect other interests of a civilized community. On the one hand the state may not unduly suppress free communication of views under the guise of conserving desirable conditions. On the other hand, when a speaker passes the bounds of argument or persuasion and undertakes incitement to riot, the state must be able to act to prevent a breach of the peace. While the vitality of our traditional civil and political institutions depends upon freedom of speech, that freedom must be exercised within the constitutional framework of law and order.

The United States Supreme Court has expressed adherence to a test to determine the rights of these conflicting claims. The states' power to prevent or punish exists "when clear and present danger of riot, disorder, interference with traffic upon the public streets or other immediate threat to public safety, peace or order appears. . . ." In applying this test the court has recognized that due respect should be given to the findings of local and state courts more conversant with existing conditions.

In two earlier decisions the United States Supreme Court has reversed convictions for offenses relating to a breach of the peace which had been affirmed by the state courts. The disturbance leading to the conviction under consideration in *Terminello* v. *City of Chicago*[3] apparently exceeded the disturbance present in the case under review. However, the Supreme Court's reversal (in a 5 to 4 decision) was based on a narrow ground, to wit: the trial court's erroneous definition of the words "breach of the peace" in its instruction to the jury. In *Cantwell* v. *Connecticut*,[4] the defendant was convicted of inciting others to breach the peace by playing a phonograph record in the presence of two men who found the views expressed on the record so offensive that one of them was tempted to strike Cantwell. However, Cantwell was not personally offensive and, on being told to leave, went on his way. In reversing the conviction, the Court held that Cantwell's action "raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question."

The United States Supreme Court sustained a conviction under a breach of the peace statute in *Feiner* v. *New York*.[5] There the defendant spoke on a public street encouraging audiences to be-

3. 337 U.S. 1, 93 L. Ed. 1131 (1949).
4. 310 U.S. 296, 84 L. Ed. 1213 (1940).
5. 340 U.S. 315, 95 L. Ed. 295 (1951).

come divided into hostile camps, interfered with traffic and refused the request of police officers to cease talking.

As pointed out by Mr. Justice Clark in his vigorous dissenting opinion in the case under review, the pertinent facts giving rise to the conviction in the case under review cannot be distinguished in any material aspect from the pertinent facts giving rise to the conviction in the *Feiner* case. However, in the *Feiner* case it is apparent from the following language in the opinion that the New York police and New York courts were given credit for good faith and good judgment not here accorded their South Carolina counterparts:

> Nor in this case can we condemn the considered judgment of three New York courts approving the means which the police, faced with a crisis, used in the exercise of their power and duty to preserve peace and order. The findings of the State Courts as to the existing situation and imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech.[6]

There is another aspect to be considered of the decision here under review. We can all agree that the constitutional guarantees of freedom of speech, freedom of assembly, and the right to petition for redress of grievances must not be circumscribed or limited unless a greater public good clearly demands it. This does not mean, however, that the exercise of these freedoms must be protected regardless of the fashion in which they are exercised. These freedoms cannot be restricted under the guise

6. Justice Frankfurter's concurring opinion in the *Feiner* case makes it clear that the United States Supreme Court is influenced by its impression of the Judiciary of the state from which the appeal arises. He states as follows:

> This Court has often emphasized that in the exercise of our authority over state court decisions the Due Process Clause must not be construed in an abstract and doctrinaire way by disregarding local conditions. In considering the degree of respect to be given findings by the highest court of a State in cases involving the Due Process Clause, the course of decisions by that Court should be taken into account. Particularly within the area of due process colloquially called "civil liberties," it is important whether such a course of decisions reflects a cavalier attitude toward civil liberties or real regard for them. Only unfamiliarity with its decisions and the outlook of its judges could generate a notion that the Court of Appeals of New York is inhospitable to claims of civil liberties or is wanting in respect for this Court's decisions in support of them. It is pertinent, therefore, to note that all members of the New York Court accepted the finding that Feiner was stopped not because the listeners or police officers disagreed with his views but because these officers were honestly concerned with preventing a breach of the peace.

of maintaining law and order, but it does not follow that all disorder and lawlessness is sanctioned by the Constitution so long as it is done in the guise of exercising a constitutional freedom.

The 187 defendants here could have exercised their freedom of speech more effectively, if not so spectacularly, individually or in small groups rather than together and simultaneously accompanied by singing and handclapping. But they could not have assured their arrest by exercising their constitutional rights in a peaceful and orderly manner.

In four cases decided during the period under review, convictions on breach of the peace charges of Negroes participating in so-called civil rights demonstrations were reviewed by the South Carolina Supreme Court. Two of these convictions were affirmed and two were reversed.

The appellants in the case of *City of Sumter* v. *McAllister*[7] were convicted on a breach of the peace charge when they refused to leave a lunch counter in the City of Sumter, customarily serving only white customers, after they had been requested to leave in each instance by the proprietors. The cause of their arrest was merely their refusal to leave. In reversing the convictions, the South Carolina Supreme Court held that the record disclosed no evidence to sustain the conviction of the defendants here on a breach of the peace charge. As distinguished from the facts in other cases, here there were no acts of violence committed or threatened, no interference with normal traffic, no boisterous conduct and no large crowds of people.

Likewise in the case of *City of Sumter* v. *Lewis*,[8] the South Carolina Supreme Court reversed the lower court's convictions of the defendants on breach of peace charges. The appellants' arrest and conviction was based on their walking back and forth in front of the Kress store and the Cut Rate drug store on Main Street in the City of Sumter bearing placards protesting racial segregation. They were arrested by the sheriff and the chief of police who concluded that the parading might cause trouble in view of the tense atmosphere existing as a result of "other incidents." However, the record disclosed that there was no overt act indicating tension, that there had been no complaint concern-

7. 241 S.C. 355, 128 S.E.2d 419 (1962).
8. 241 S.C. 364, 128 S.E.2d 685 (1962). This case is also noted in the Criminal Law section at note 23.

ing the appellants, that they were walking quietly and orderly and without obstructing traffic, and that nothing was said to them by the arresting officer prior to making the arrests. On the basis of these facts the Supreme Court held that the record did not contain facts to support the charge of breach of the peace.

The defendants who appealed their convictions on breach of the peace charges in the case of *City of Rock Hill* v. *Henry*[9] had been arrested as a result of conduct quite different from the conduct apparent from the record in the case of *City of Sumter* v. *Lewis*.[10] Here the defendants had been engaged in singing patriotic and religious songs in a loud and boisterous manner in the City of Rock Hill in a crowd that overflowed from the sidewalk into the street. The defendants' "demonstrating" was done in such a loud and boisterous manner that work in the city hall was disrupted, and they continued their demonstration after they had been requested by the police to stop. On the basis of these facts, the South Carolina Supreme Court sustained the convictions below noting that ". . . even praiseworthy acts may be done at a time and place and in such manner as to be unjustifiable and unlawful resulting in a breach of the peace. There is ample evidence here to support the conclusion that the police acted in good faith to maintain the public peace, to assure the availability of the streets for their primary purpose of usability by the public and to maintain order in the community."

In the case of *State v. Fields*[11] and its companion cases, the defendants' lower court convictions on breach of the peace charges were affirmed. There the defendants in three groups totalling approximately one thousand left the campus of South Carolina State College in the City of Orangeburg ostensibly to petition the city officials for a redress of grievances in allegedly denying to them the right of peaceful assembly and of freedom of speech. The processions blocked traffic, cluttered the streets, and blocked the sidewalks rendering them useless for pedestrian traffic, and forcing pedestrians into the street. As the processions approached the main business section of the City of Orangeburg, they were intercepted by police officers and requested to disburse. While some of the demonstrators complied, many refused, including the

9. 241 S.C. 427, 128 S.E.2d 775 (1962). This case is also cited in the Criminal Law section at note 27.
10. 241 S.C. 684, 128 S.E.2d 685 (1962).
11. 68 S.C. 148, 46 S.E. 771 (1904).

defendants who were arrested and charged with the offense of breach of the peace.

In sustaining the convictions below, the South Carolina Supreme Court noted that the constitutional guaranties to which the defendants are entitled cannot be asserted in such a manner as to imperil the community and that state action is permitted "when a clear and present danger of riot, disorder, interference with traffic upon the streets or other immediate threat to public peace and order appears."

II. ENFORCEMENT OF TRESPASS STATUTE AGAIN SUSTAINED

The appellant in the case of *City of Rock Hill* v. *Hamm*[12] was a Negro who had been convicted in the Recorder's Court in the City of Rock Hill on the charge of violating the statutory trespass statute, and his conviction was affirmed by the circuit judge. The charge grew out of the appellant's refusal to leave a lunch counter at a local ten cent store in the City of Rock Hill after he had been refused service and requested by the manager to leave.

In several decisions reviewed in an earlier issue of this Law Review,[13] the South Carolina Supreme Court sustained the enforcement of trespass statutes against the charge that state action in enforcing them was in the furtherance of an unlawful policy of segregation and thereby constituted state action in violation of the due process and equal protection provisions of the fourteenth amendment. Again in this decision the South Carolina Supreme Court reaffirmed its earlier position and sustained the enforcement of the trespass statute there against a similar attack.

III. PARADE ORDINANCE HELD UNCONSTITUTIONAL

In a 1961 decision, the South Carolina Supreme Court upheld an ordinance of the City of Darlington which prohibited public parades in the absence of a permit to be issued by the mayor and city council against the attack that it placed absolute discretion in the mayor and city council and therefore constituted a prior

12. 241 S.C. 420, 128 S.E.2d 907 (1962).
13. City of Columbia v. Bouie, 239 S.C. 570, 124 S.E.2d 332 (1962); City of Greenville v. Peterson, 239 S.C. 298, 122 S.E.2d 826 (1961); City of Charleston v. Mitchell, 293 S.C. 376, 123 S.E.2d 512 (1961); 15 S.C.L. REV. 43 (1963).

restraint upon the exercise of freedom of speech.[14] The ordinance was sustained on the grounds that implicit in the ordinance taken as a whole were standards which the mayor and city council must follow. However, the ordinance under a similar attack in a case decided during the period under review, *City of Florence* v. *George*,[15] contained no such standards either expressly or by implication. The ordinance merely prohibited parades (except parades by military forces, the police and fire departments) "except in accordance with a permit issued by the Chief of Police. . . ."

The appellants had been convicted in the lower court as a result of participating in a parade upon the public streets in the City of Florence protesting claimed grievances against alleged discriminations. They contended that the ordinance under which they were convicted was unconstitutional because it rendered the right of freedom of speech and of assembly upon the public streets of Florence subject to the uncontrolled will or whim of the Chief of Police.

The respondents argued that the conviction below should be upheld upon the authority of the *Stanley* decision upholding the City of Darlington ordinance. However, the Supreme Court held that the facts of the two cases were readily distinguishable because in the *Darlington* decision there were implicit standards and limitations not present in the ordinance under which the appellants here had been convicted. The South Carolina Supreme Court therefore held the ordinance unconstitutional and reversed the convictions below. It also held that the fact that the appellants had not applied for a permit as required by the ordinance was immaterial.

IV. RIGHT TO BE REPRESENTED BY COUNSEL

The sixth amendment to the United States Constitution guarantees to an accused in a criminal prosecution the assistance of counsel for his defense. In its 1942 decision in the case of *Betts* v. *Brady*,[16] the United States Supreme Court held that the due process requirements of the fourteenth amendment did not require the appointment of counsel in all criminal prosecutions in state courts. The right to be represented by counsel was con-

14. City of Darlington v. Stanley, 239 S.C. 139, 122 S.E.2d 207 (1961).
15. 241 S.C. 77, 127 S.E.2d 210 (1962). This case is also noted in the Administrative Law section at note 43 and in the Criminal Law section at note 22.
16. 316 U.S. 455, 86 L. Ed. 1595 (1942).

sidered by the South Carolina Supreme Court in three decisions handed down during the period under review.

In the first rendered decision, *Pitt* v. *State*,[17] the appellant had been tried without the assistance of counsel and convicted of armed robbery before the Charleston County Court of General Sessions. He subsequently filed a petition for a writ of habeas corpus which was denied by the lower court. This appeal followed. The appellant contended that he was unjustly imprisoned because he had not been represented by counsel during the course of his trial.

The Supreme Court rejected the appellant's contention and affirmed the order of the lower court on two grounds: (1) It held that armed robbery being a non-capital offense, the appellant had not been denied due process because the fourteenth amendment does not require that counsel be appointed to represent a defendant in a non-capital case in state courts where the circumstances of the particular case are not such that the furtherance of justice would be defeated if counsel were not provided; and (2) The court found that the defendant, a person of above-average intelligence with a fifth grade grammar school education and three years' service in the United States Army, could intelligently and understandingly waive his right to counsel; and that he had, in fact, done so and had elected voluntarily to go to trial without counsel.

The two remaining South Carolina cases decided during the period under review and dealing with the right to counsel actually involve the question of the performance of court appointed counsel. In the case of *Crosby* v. *State*,[18] the appellant based his claim for a writ of habeas corpus upon his charge that his court-appointed attorneys inadequately represented him. This charge was based on his claim that the attorneys had urged him to plead guilty to the crime of rape in order to avoid the electric chair. Again the South Carolina Supreme Court affirmed the lower court's refusal to grant the writ of habeas corpus stating that the effective representation by counsel guaranteed by due process of law does not mean perfection on the part of the attorney. Inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus unless it is such as to shock the conscience of the court and make the court proceedings

17. 240 S.C. 557, 126 S.E.2d 579 (1962). This case is also noted in the Criminal Law section at note 5.
18. 241 S.C. 40, 126 S.E.2d 843 (1962).

a farce and mockery of justice. The charge here, the court held, amounted to no more than a charge that counsel, properly appointed, had given bad advice.

The appellant in the case of *Moore* v. *State*[19] petitioned the lower court for a writ of habeas corpus and was granted a hearing as a result. At the hearing the petitioner was given an opportunity to present witnesses and to testify in his own behalf but failed to offer any evidence to support his petition. The appeal here was from the order of the circuit court dismissing the petition on the grounds that no showing had been made to entitle the petitioner to relief.

Appellant contended that he was incompetently represented by the court appointed counsel who, appellant claimed, was not sufficiently able in eliciting the truth upon cross-examination of state witnesses. Furthermore, appellant contended that he had been denied compulsory process for obtaining witnesses.

The Supreme Court considered that the only question properly before it on this appeal was whether the appellant had made any showing that he had in fact been deprived the right of compulsory process. The Supreme Court, assuming without deciding that denial of compulsory process is a proper ground for relief by habeas corpus, held that the burden to show such denial was upon the appellant and that the appellant had offered no evidence to support that contention. Thus the Supreme Court affirmed the lower court.

Subsequent to the rendering of the three decisions discussed above by the South Carolina Supreme Court and on March 18, 1963, the United States Supreme Court in the case of *Gideon* v. *Wainwright*[20] overruled its previous decision in *Betts* v. *Brady*. The defendant in the *Gideon* case was convicted of a felony by a Florida state court. Prior to his trial, the defendant had requested that the court appoint a lawyer to defend him. The Florida court had refused on the grounds that the defendant was being charged with a non-capital offense, and therefore due process did not require the court to appoint counsel to defend him. The United States Supreme Court reversed and held that the right to be represented by counsel guaranteed by the sixth amendment is a right of such fundamental nature that it is protected from state invasion by the fourteenth amendment.

19. 241 S.C. 279, 128 S.E.2d 109 (1962).
20. 372 U.S. 335, 9 L. Ed. 2d 799 (1963). This case is also noted in the Criminal Law section at note 1.

The impact of the *Gideon* decision on those states, including South Carolina, which have held, in line with the *Betts* decision, that due process did not require the appointment of counsel in non-capital cases in state courts will be considerable. Undoubtedly, many petitions for writs of habeas corpus have been and will be filed. New trials in many cases will be impossible as a practical matter due to the destruction of evidence and the death of witnesses.

The basis of the United States Supreme Court's holding in the *Gideon* case was that there is no real distinction in logic between a capital and a non-capital case, and that a man's liberty is to be protected equally with a man's life. We can all agree with this point of view in theory, but to extend the logic of the United States Supreme Court, for instance, to include minor cases involving criminal offenses tried in a magistrate's court, would be wholly impractical.

V. HABEAS CORPUS DECISIONS

In addition to cases discussed under the question of a defendant's right to be represented by counsel, the Supreme Court has handed down two other decisions during the period under review dealing with habeas corpus.

In the case of *Tillman* v. *Manning*,[21] the lower court had dismissed the appellant's petition for a writ of habeas corpus attacking the validity of his detention. It was dismissed without a hearing on the grounds that the petition failed to set forth any basis for the issuance of the writ.

Without going into the factual matters presented, the Supreme Court concluded that the allegations contained in the petition together with the facts appended thereto presented a material issue of fact, and that therefore the appellant was entitled to a hearing on his petition. The court quoted with approval the following language applicable here: "It would seem to be settled law that when a material issue of fact is presented by habeas corpus petition, even though the allegations of the petition may tax credulity, the prisoner must be produced and given a hearing by the court, where the facts alleged are dehors the record, were not open to consideration and review on appeal, and constitute a charge that the accused has been convicted in disregard of his constitutional rights."

21. 241 S.C. 221, 127 S.E.2d 721 (1962).

In the case of *Bowers* v. *State*,[22] the circuit judge had denied the appellant's petition for a writ of habeas corpus on the grounds that it set forth no basis for the issuance of the writ. Here the appellant in 1950 was sentenced to life imprisonment. In 1961 he was again sentenced to life imprisonment, and this second life sentence was directed to run consecutively to the first life sentence. Again in 1961 he was sentenced to life imprisonment for murder, this last sentence to run concurrently with the former life sentences. The appellant did not appeal from any of the convictions or sentences.

The only question presented by the appellant in his petition was whether it is proper to impose a life sentence which is to run consecutively to a former life sentence. The decision of this question in appellant's favor would not have entitled him to be released from the state penitentiary, therefore the Supreme Court held that it was not necessary to decide the question because the writ of habeas corpus was not available to the appellant.

In the case of *Gary* v. *State*,[23] the Supreme Court sustained the order of the lower court dismissing the appellant's petition for a writ of habeas corpus where the petition was barren of any allegation of facts showing that the appellant's restraint in the state penitentiary was illegal. The Supreme Court held that inasmuch as the petition failed to state a prima facie case, it was properly dismissed without a hearing.

VI. SPECIAL ACT DECISIONS

During its 1962 session the General Assembly passed an act which provided that all roads designated for hard surfacing in the state highway secondary construction program in Dorchester County should be selected from a list submitted in writing by the Board of Directors of Dorchester County and the Road Supervisor of Dorchester County or a majority thereof. The suit of *Knight* v. *Hollings*[24] was instituted for the purpose of having the act declared unconstitutional on the grounds that it was special legislation where a general law could be made applicable and therefore violative of article III, section 34, subsection IX of the South Carolina Constitution. The defendants conceded that the act was a special law where a general one could be and has been made applicable, but demurred to the complaint on the

22. 241 S.C. 282, 127 S.E.2d 881 (1962).
23. 241 S.C. 266, 127 S.E.2d 888 (1962).
24. 242 S.C. 1, 129 S.E.2d 746 (1963).

South Carolina Law Review, Vol. 16, Iss. 1 [2020], Art. 6

grounds that the act was permitted by virtue of article II of the amendments of The South Carolina Constitution which reads as follows:

> The General Assembly of this State may enact local or special laws concerning the laying out, opening, altering or working roads or highways and concerning the providing for the age at which citizens shall be subject to road duty and concerning drainage.

In the light of the well-established rule that legislation expressly permitted under one provision of the Constitution does not come within the limitations of subsection IX of section 34 of article III,[25] defendants argued for the act's validity.

The question basically is one of interpretation, to wit: whether the amendment was intended to refer only to local county roads or whether it was intended to include roads within a state-wide system of roads and highways operated by the South Carolina State Highway Department. The circuit judge held that the intent of the amendment was limited to local county roads, and overruled the demurrer. This appeal followed.

In reaching its decision, the South Carolina Supreme Court reviewed the history of the amendment which had been proposed in 1904 and ratified in 1905, long prior to the establishment of the State Highway Department and of its state-wide system of roads and highways. The Constitution of 1895, as originally adopted, included as subsections II and IX of section 34 of article III express prohibitions against the enactment of local or special laws "to lay out, open, alter or work roads or highways" (subsection II) or "to provide for the age at which citizens shall be subject to road or other public duty." (subsection IX) The legislative background of the amendment revealed that its purpose was to repeal the aforesaid express prohibitions of subsections II and IX against special legislation in order to permit the General Assembly to provide by special laws for the maintenance and improvement of the roads in the respective counties. The Supreme Court concluded that the amendment did not repeal what was originally subsection XI, now subsection IX of section 34, article III, which in general prohibits a special law where a general law can be made applicable.

25. Ruggles v. Padgett, 240 S.C. 494, 126 S.E.2d 553 (1962). This case is also noted in the Public Corporations section at note 1. Shelor v. Pace, 151 S.C. 99, 148 S.E. 726 (1929); City of Greenville v. Foster, 101 S.C. 318, 85 S.E. 767 (1915); City of Columbia v. Smith, 105 S.C. 348, 89 S.E. 1028 (1916).

Thus, the Supreme Court concluded that the purpose and intent of the amendment was to permit special legislation in connection with laying, opening, altering or working county roads and did not extend to the legislation here which dealt with a different matter, to wit: the State Highway Department in the selection of roads for hard surfacing in its system. The opinion states that "to give to the amendment the construction for which Appellants contend would be to extend its scope beyond its intended purpose and beyond the meaning manifest in its expressed language."

The Supreme Court accordingly affirmed the lower court and held that the act challenged, not being within the scope of the amendment, is prohibited by article III, section 34, subsection IX.

In a previous decision,[26] the Supreme Court had before it the question of the authority of the City Council of Greenville to permit an overhead encroachment upon the city streets by a parking facility. The Supreme Court held there that the City of Greenville holds title to the streets involved in trust for the public for street purposes only and has no authority to permit them to be used for private purposes, and therefore denied its right to permit the encroachment.

Subsequently, in 1960, the General Assembly passed legislation to authorize cities within a certain population range to authorize the construction of parking buildings overhanging the public streets. This legislation was vetoed by the Governor as special legislation, among other reasons, limited in fact to the City of Greenville alone.

Thereafter at its 1961 Session, the General Assembly passed an act generally empowering a municipality to authorize the construction of parking facilities which encroach upon and project over the public sidewalks.

This 1961 enactment was challenged on constitutional grounds in the case of *Ellison* v. *Cass*.[27] The act here provided that no such parking facility shall be allowed to encroach upon or project over any street within the state highway system "but this provision shall not apply to any such parking facility constructed or in the process of construction at the time of the passage of the Act."

26. Sloan v. City of Greenville, 235 S.C. 277, 111 S.E.2d 573 (1959), 76 A.L.R. 2d 888 (1959).
27. 241 S.C. 96, 127 S.E.2d 206 (1962).

South Carolina Law Review, Vol. 16, Iss. 1 [2020], Art. 6

The lower court held that the 1961 legislation was unconstitutional in so far as it would allow Simpson and Ellison, the original promoters of the Greenville parking facility, to encroach over a state highway. It was conceded that the effect of the above quoted provision was to permit such encroachment by no one else inasmuch as they were the only parties engaged in the construction of a parking facility at the time the act was passed.

The Supreme Court affirmed the lower court. It held that the history of the litigation and legislation here leaves no doubt that the obvious intention and purposes of the proviso with respect to encroachment upon state highways was to allow Simpson and Ellison, with the permission of the City Council, to build the particular building here in question. The Supreme Court therefore found that the purpose of the legislation was to give special treatment to Simpson and Ellison and struck down the act for that reason stating: "It is, however, implicit in both the State and Federal Constitutions that legislation may not be discriminatory; that it must give equal protection to all; and that special legislation granting special benefits to private individuals, as contrasted with the public at large, is not permissible."

The appellant contended that with the discriminatory provisions struck down, the remainder of the act was separable and should be allowed to stand. The Supreme Court, however, found that the history of the legislation and litigation here leads to the conclusion that no part of the act would have been passed except for the purpose of allowing Simpson and Ellison the privilege of constructing, with the approval of the City Council of Greenville, the particular building in question. It therefore concluded that the entire act should be stricken.

The holding here is not based merely upon the prohibition of special legislation contained in article III, section 34 of the South Carolina Constitution. It is clear that the legislation here would have been struck down regardless of the provisions of article III, section 34 on the grounds that it violates the provisions of the state and federal constitutions guaranteeing to each citizen the equal protection of the laws.

VII. DELEGATION OF POWER TO DEFINE CONTRABAND UPHELD

In the case of *Cole* v. *Manning*,[28] the appellants had pled guilty in the lower court to conspiracy to violate Section 55-14 of the 1952 Code (now Section 55-383 of the 1962 Code) by furnishing prisoners in the state penitentiary 10,000 tablets of amphetamine, a drug which had been declared contraband by the Director of Prisons. The appellants were sentenced, imprisoned, and thereafter obtained a writ of habeas corpus to determine the legality of their confinement. The circuit judge, on hearing the matter, issued his order denying their prayer for release and holding the appellants' confinement legal. The appeal to the Supreme Court was from the said order.

The code section under which the appellants were convicted empowers the Director of the prison system to declare "any matter" to be contraband. Matters so determined by the Director as contraband are then published by the Director "in a conspicious place available to visitors at each correctional institution." If any person furnishes any prisoner under the jurisdiction of the Department of Corrections with any contraband matter as determined in the aforesaid fashion by the Director, such person shall be guilty of a felony and subject to a fine or imprisonment or both.

The appellants contended that the statute was unconstitutional in that it unlawfully delegated to the Director of Prisons legislative power to determine what is contraband, and thereby the power to define a crime without providing any standards by which the Director is to be guided in determining what things he may declare contraband, thus leaving the matter to the absolute unregulated and undefined discretion of the Director.

The Supreme Court upheld the constitutionality of the statute, under the general law stated as follows:

"It is elementary that the Legislature may not delegate to an administrative agency its power to make laws. However, no violence is done to the principle of separation of governmental power when a law complete in itself declaring a legislative policy and establishing primary standards for carrying it out or with proper regard for protection of the public interest and with such

28. 240 S.C. 260, 125 S.E.2d 621 (1962). This case is also noted in the Administrative Law section beginning at note 10 and in the Criminal Law section at note 18.

degree of certainty as the case permits laying down an intelligible principle to which the administrative agency must conform delegates to the agency the power to prescribe regulations for the administration and enforcement of that law within its expressed general purpose."

The difficulty in applying this general law to a given situation is pointed up by comparing a recent decision of the South Carolina Supreme Court with the case under review.

In its 1955 decision in *South Carolina State Highway Dept.* v. *Harbin*,[29] the Supreme Court struck down as an unconstitutional delegation of power to the State Highway Department the power given the Department by Section 46-172 of the 1952 Code on the grounds that the suspension or revocation of licenses provided for therein was left to the absolute, unregulated, and undefined discretion of the State Highway Department. Section 46-172 reads as follows:

> for cause satisfactory to the Department it may suspend, cancel or revoke the drivers license of any person for a period of not more than one (1) year . . .

The court reached this conclusion although the Highway Department argued that effective legislative standards were imposed under existing legislation which disclosed the general purpose of the statute to be to deny a driver's license to those who by reason of physical or mental affliction are unfit to operate a motor vehicle and to revoke the licenses of those who by negligence or reckless acts indicated disregard to the safety of others on the highway. The Highway Department argued from this that the discretion questioned could only be exercised for a cause having to do with public safety. However, the court did not feel that it was at liberty to add such a limitation to the "clear and unambiguous language of Section 46-172."

Compare the holding in the *Harbin* decision, with the Supreme Court's subsequent holding in the case of *City of Darlington* v. *Stanley*,[30] which was concerned with an alleged prior restraint upon freedoms of speech and assembly. There an ordinance of the City of Darlington was under attack as an unlawful delegation of power because it required persons desiring to parade on the city streets to apply for a permit whereupon "the Mayor

29. 226 S.C. 585, 86 S.E.2d 466 (1955).
30. 239 S.C. 139, 122 S.E.2d 207 (1961).

or City Council shall in its discretion issue such permit subject to the public convenience and public welfare." In the *Stanley* decision the court was willing to read into the ordinance a standard by implication that the Mayor or City Council would be guided by the safety, comfort and convenience of persons using the streets in issuing a permit.

In the case under review the statute itself sets up no standards by which the Director is to be guided, but appears to vest in him absolute discretion to declare "any matter" to be contraband. However, in other provisions of the 1960 act (51 Statutes at Large 1970) of which the code section is a part, there is expressed a legislative policy that the state shall maintain a modern system of prisons where prisoners shall be given humane treatment and opportunity, encouragement, and training in the matter of reformation. On the basis of these general statements contained in the 1960 act, the Supreme Court upheld the statute under attack as a proper delegation to the Director of Prisons "of the power in the exercise of a reasonable discretion to make administrative regulations in that regard appropriate to effectuate the legislative purpose which in essence was and is the maintenance of a modern prison system with humane treatment of prisoners, attention to their welfare and assistance towards their rehabilitation." However, there is a vigorous dissent by Justice Bussey pointing out the difficulty encountered in distinguishing the situation here from the facts in the *Harbin* decision.

It would appear reasonable to conclude from the decision here under review that the South Carolina Supreme Court is following the modern tendency to be more liberal in permitting grants of discretion to administrative boards and officers in order to facilitate the administration of laws as the complexity of economic and governmental conditions increases.

VIII. CITY OF COLUMBIA LICENSE ORDINANCE UPHELD

In the case of *City of Columbia* v. *Putnam*,[31] the appellant had been convicted below for failure to pay for and procure a business license from the City of Columbia for the Columbia office of his casualty insurance company. The appellant contended that the ordinance constituted an arbitrary and unreasonable classification as to his company. To support his contention,

31. 241 S.C. 195, 127 S.E.2d 631 (1962).

he pointed to the fact that the ordinance charged casualty companies on the basis of a flat percentage of their gross premiums, while it charged life, health, and hospital insurance companies on a different basis resulting in a lower license fee for comparable amounts of gross premiums.

The Supreme Court upheld the conviction on the grounds that a municipality is empowered to fix different rates for licenses where the classifications are different. The fact that one classification may pay more proportionately than other classifications does not of itself make the license fee unreasonable or arbitrary since this is largely within the discretion of the municipality's governing body.

IX. "DAMAGING" HELD TO BE "TAKING"

The plaintiffs in the case of *Hoffman* v. *County of Greenville*[32] brought an action for damages allegedly inflicted upon their property by flooding resulting from the county's action in cutting a drainage ditch across their property and the consequent collection of surface water from the adjacent area which was dumped in increased volume upon their property so as to deprive them of the beneficial use and full enjoyment thereof. The plaintiffs contended that the action of the county constituted the taking of their property for public use, entitling them to just compensation under article I, section 17 of the South Carolina Constitution. On trial below the jury awarded a verdict to the plaintiffs, and this appeal by the county followed. Although the lower court verdict was reversed (on grounds not material to this review), the Supreme Court held that there was evidence of a taking by the county of the property of the plaintiffs for public use in violation of article I, section 17.

In this connection the Supreme Court noted that it does not recognize in the construction of article I, section 17 any distinction between "taking" and "damaging," but that the constitutional prohibition against taking private property for public use without just compensation "must have been intended to protect all the essential elements of ownership which makes property valuable, including the right of use and enjoyment."

32. 242 S.C. 34, 129 S.E.2d 757 (1963).

X. COURT REFUSES TO ESTABLISH "PUBLIC POLICY"

The case of *Page* v. *Winter*[33] involved an action brought by a wife for loss of consortium resulting from personal injuries alleged to have been inflicted upon her husband through the negligent misconduct of a third person. The lower court sustained a demurrer to the complaint upon the ground that it stated no cause of action recognized or existing under the laws of South Carolina. The appeal here followed.

Beginning with the proposition that recovery by a wife for loss of consortium resulting from the negligent misconduct of a third person was not permitted at common law, the Supreme Court held that adherence to this rule was a part of the public policy of this state. Consequently, the court concluded that if the rule is to be changed, it must be changed by the legislature and not by the courts regardless of how illogical or undersirable the court may find the rule to be. In reaching its conclusion, the Supreme Court reiterated its position stated in the case of *Rogers* v. *Florence Printing Co.*[34] wherein the appellant had asked the court to reject the doctrine of punitive damages as a matter of public policy.

XI. ACTUAL NOTICE MEETS THE REQUIREMENTS OF DUE PROCESS

In the case of *Tripp* v. *Tripp*[35] the appellant was the son of the decedent Raymond B. Tripp by a former marriage. The decedent's widow had probated his will in Cuyahoga County, Ohio, and the appellant had been given no formal notice of the Ohio probate proceedings. However, he had actual knowledge of their pendency and apparently ample opportunity as a consequence to contest the jurisdiction of the court. The pertinent Ohio statute required notice of probate proceedings only to persons known "to be residents of the state who would be entitled to inherit from the testator . . . if he had died intestate." The appellant was not a resident of the State of Ohio.

The appellant had filed in the Probate Court of Spartanburg County an exemplified copy of the decedent's will which was admitted to probate there in common form on October 15, 1959,

33. 240 S.C. 516, 126 S.E.2d 570 (1962).
34. 230 S.C. 304, 95 S.E.2d 616 (1956).
35. 240 S.C. 339, 126 S.E.2d 9 (1962).

and on the same day the appellant gave notive that he required the will to be proved in due form of law. The respondent contended that the appellant was precluded from contesting the will in South Carolina because he was barred by the earlier Ohio proceedings.

The constitutional issue raised here was whether or not the requirements of due process of law as far as the appellant was concerned had been complied with in the Ohio probate proceedings.

The appellant urged, in support of his position, that formal notice was a requisite to comply with the due process requirements. He cited recent United States Supreme Court decisions in the cases of *Mullane* v. *Central Hanover Bank*[36] and *Walker* v. *City of Hutchinson*[37] wherein the Court held that in cases involving a trustee's accounting and in cases involving condemnation of land, due process is no longer satisfied by complying with the usual publication of notice statutes but requires some form of actual notice to be given in reasonable fashion to all persons affected whose whereabouts are known or ascertainable.

The South Carolina Supreme Court in the case under review held that the due process requirements under the doctrine of the *Mullane* decision were met in view of the fact that the appellant had actual notice. The implication of the decision, however, is that, absent actual notice, the Ohio probate proceedings would not have met due process requirements.

XII. CONSTITUTIONAL QUESTIONS NOT DETERMINED

In the case of *Heyward* v. *South Carolina Tax Comm'n*[38] the appellant executor sought to recover income taxes which he had paid under protest in accordance with a regulation of the South Carolina Tax Commission. The regulation in question required that any balance of an installment sale must be reported on the final return of a deceased taxpayer. In computing the tax in accordance with the regulation, the executor had paid a larger amount of taxes than would have been paid if the tax had been computed in each subsequent year on the basis of installments

36. 339 U.S. 306, 94 L. Ed. 865 (1950).
37. 352 U.S. 112, 1 L. Ed. 2d 178 (1956).
38. 240 S.C. 347, 126 S.E.2d 15 (1962). This case is also noted in the Administrative Law section at note 32.

actually received. The Supreme Court held that the Tax Commission had no legal authority to enact the regulation in question which was, in effect, a new law. It ruled with the appellant executor on that basis and therefore did not consider his contention that the Tax Commission's assessment constituted a denial of due process and of the equal protection of the laws guaranteed under both the state and federal constitutions, reaffirming its traditional reluctance to determine constitutional questions "unless their determination is essential to a disposition of the case." In this connection it should be noted that an exception exists to this general rule in the case of questions of public interest originally encompassed in an action and which should be decided for future guidance, however abstract or moot they may have become in the immediate contest.[39]

39. Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88 (1947).