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Taxation

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I. LEGISLATION

The work of the Tax Study Commission continued to bear fruit, as nine of thirteen bills recommended by the Committee were adopted by the General Assembly. The most important recommendation that failed to be adopted during the session of the General Assembly was the proposal that South Carolina enact a state gift tax law to implement the new state estate tax.[1] The proposed gift tax would incorporate by reference existing provisions of federal law in regard to determining what constituted a taxable transfer, and other technical provisions such as the annual exclusion per donee[2] and the specific exemption.[3] The tax rates would be determined by the South Carolina statute, being set at 75 percent of the rates under the South Carolina Estate Tax, for each rate bracket.[4] The tax would be effective for calendar years beginning January 1, 1965. This proposal of the Tax Study Committee appears to be a sound one. As the committee observed in its annual report:[5]

> Although our estate tax rates are reasonabale, gifts of property will continue to be made in order to avoid the high Federal rates. Therefore, for South Carolina estate tax purposes the base of the tax is constantly being reduced without the backstop of a gift tax being available.

To coordinate this proposed statute with the new estate tax, the committee also recommended adoption of a provision permitting a credit under the estate tax for tax paid on gifts which were later held to be includible in the gross estate of the donor.[6]

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1. The Estate Tax was recommended to the General Assembly by the Tax Study Commission in its Second Annual Report, February, 1961, and is now found in S.C. CODE §§ 65-451 to 65-570 (1962).

2. INT. REV. CODE OF 1954, § 2503(b). Because of the incorporation of this exclusion in the South Carolina proposed gift tax, no gift tax return would be required to the state except where a return would also be required to the federal government.

3. INT. REV. CODE OF 1954, § 2521.

4. The present South Carolina Estate Tax rates are from 4% to 6% of the "taxable estate" as defined in the act. However, as in the federal law, the estate and gift tax rate schedule and the exemptions would be independent.

5. Fourth Annual Report, South Carolina Tax Study Commission 16 (1963).

6. Because of the incorporation by reference of INT. REV. CODE OF 1954, §§ 2035 to 2044.

Most of the statutes proposed by the Tax Study Commission and adopted by the General Assembly are technical in nature, and need no comment here.[7] One is of general interest.[8] It extends to the tax authorities of other states which extend like comity the right to sue in the courts of South Carolina, to collect taxes due the foreign state. At the same time, the act authorizes the Tax Commission, with the assistance of the Attorney General, to sue in foreign states to collect taxes legally due this state. While there has been in the past much statement in judicial opinions and elsewhere that a court could not entertain questions concerning foreign penal or tax laws,[9] there now seems to be no reason to doubt that a statute of this sort should be upheld. Recent decisions in state courts[10] appear to be sound, and the Supreme Court of the United States, Mr. Justice Stone writing, has expressed strong dicta:[11]

> But even if the full faith and credit is not commanded there is nothing in the Constitution and laws of the United States which requires a court of a state to deny relief upon a judgment because it is for taxes. A state court, in conformity to state policy, may, by comity, give a remedy which the full faith and credit clause does not compel. [Citing cases]. . . . A suit to recover taxes due under the statutes of another state has been allowed without regard to the compulsion of the full faith and credit clause. The privilege may be extended by statute.

Naturally, the taxpayer can raise any question in his defense in the action that he could have raised if the action had been brought initially in the state assessing the tax.[12]

7. S.C. Acts, 1963, contain the following bills recommended by the Tax Study Commission: Income Tax, No. 241, p. 273, No. 104, p. 101, No. 194, p. 225, No. 245, p. 279; Other Taxes, No. 259, p. 289 (Sales and Use Tax), Nos. 196 and 197, p. 227 (Refund procedure), and No. 340, p. 568 (Incorporation by reference of federal provisions).

8. S.C. Acts, 1963, Act No. 195, p. 226.

9. Moore v. Mitchell, 30 F.2d 600 (2d Cir. 1929), affirmed on another ground, 281 U.S. 18, 4 L. Ed. 673 (1930); 51 Am. Jur. *Taxation* § 993 (1938).

10. State *ex rel.* Oklahoma Tax Comm'n v. Rodgers, 238 Mo. App. 1115, 193 S.W.2d 919, 165 A.L.R. 785 (Mo. Ct. App. 1946) is a scholarly and thoughtful review of the authorities; J. A. Holshouser Company v. Gold Hill Copper Co., 138 N.C. 248, 50 S.E. 650 (1905). The latter decision is "recent" only in the light of the origin of the view that one state will not enforce the revenue laws of another, in dicta of Lord Hardwicke in 1734, Boucher v. Lawson, 95 Eng. Rep. 53, and Lord Mansfield in 1775, Holman v. Johnson, 98 Eng. Rep. 1120.

11. Milwaukee County v. M. E. White Co., 296 U.S. 268, 272, 80 L. Ed. 220, 224 (1935).

12. The court in the *Rodgers* case suggested that any inconvenience to the taxpayer from having to present his defenses in a state other than that in

Another statute enacted during this session, this one not proposed by the Tax Study Commission, merits a few observations. This is a statute relating to apportionment of state estate taxes, where there exists both probate property and non-testamentary property included in the gross estate of a decedent.[13] Thanks to wise judicial workmanship of the Supreme Court,[14] South Carolina now has a satisfactoy scheme governing the apportionment of estate taxes. The statute adopted in this session is intended to round out the picture. The case of *Myers v. Sinkler*[15] held that federal estate taxes must be apportioned between the testamentary and non-testamentary assets, absent other direction of the testator, and the statute applies the same rule to state estate taxes. It is likely that the Supreme Court would have reached the same result without the statute, as a natural implication of the *Myers* holding. In any event, the statute seems to give legislative approval to that holding. At the time the operative facts in the *Myers* decision occurred, the new South Carolina state tax had not yet been enacted.

This whole problem of the ultimate resting place of the tax burden on an estate demands the more careful attention of the draftsman of a will or the estate planner.[16] The decisions of the Supreme Court of South Carolina referred to adopt wise rules of construction. As the *Dial* case shows, however, imprecise language leads at the best to litigation, and at the worst to distortion of the dispository plan of an estate. All the rules adopted thus far, by legislature, federal[17] or state,[18] or by the courts, are rules of construction, rules that operate "unless the testator directs otherwise." It is incumbent on the draftsman to provide this precise direction in the instrument.

For possible future legislative proposal to the General Assembly, the Tax Study Commission will no doubt follow with

which the events occurred was brought on by his removal from the taxing state, and that if the action could be brought in the taxing state, the doctrine of forum non conveniens might apply to an action brought in the other state. Annot., 165 A.L.R. 785, 794 (1946).

13. S.C. ACTS, 1963, Act No. 199, p. 229.

14. Dial v. Ridgewood Sanitorium, 240 S.C. 64, 124 S.E.2d 598 (1962); Myers v. Sinkler, 235 S.C. 162, 110 S.E.2d 241 (1959); Gaither v. United States Trust Co., 230 S.C. 568, 97 S.E.2d 24 (1957).

15. Supra, note 14.

16. CASNER, ESTATE PLANNING, 1132-1144, 1652 (3d ed. 1961). That recent litigation in this area is not confined to this state is indicated in CASNER, 1963 SUPPLEMENT TO ESTATE PLANNING, 288-295 (1963).

17. INT. REV. CODE OF 1954, §§ 2205, 2206, 2207.

18. S.C. CODE §§ 65-562, 65-563 (1962) as amended by the 1963 Act.

interest the reception given in the several states to the proposed Uniform Estate Tax Apportionment Act.[19]

II. JUDICIAL DECISIONS

A. VALIDITY OF REGULATION

1. Income in Respect of a Decedent

Heyward v. South Carolina Tax Com'n[20] involved a problem which plagued federal tax law[21] until it was resolved by an intricate statutory provision.[22] Simplified, the facts were as follows: in 1956, A sold certain shares of stock of X Corporation which had cost A 1,000 dollars. A sold them for 10,000 dollars cash and an agreement of the purchaser to pay an additional 30,000 dollars in four annual installments of 7,500 dollars each. This agreement was evidenced by notes. A elected to report this transaction on the installment basis, pursuant to an informal policy of the Tax Commission permitting such an election. Hence, in his first return A reported the 10,000 dollars cash, but not the notes, as income. In 1957, A received the first installment payment of 7,500 dollars. Shortly thereafter, still in 1957, A died. In the income tax return filed for A, his executor, plaintiff in this case, reported this 7,500 dollars as income, but omitted the other notes. The Tax Commission asserted that this was erroneous, and that pursuant to its informal practice, A's executor must report for the return of A for the year of A's death the accrual of the entire 22,700 dollars remaining owed on the notes, in addition to the 7,500 dollars received by A.

The executor paid the tax under protest, and sued for refund. He argued that the Tax Commission, having agreed to decedent's election of the installment method, was now estopped to deny the executor the right to continue to report the income using that method. He also argued that there was no authority for the Tax Commission's action of putting the decedent on the accrual basis because of his death.[23] Several arguments based on the Constitu-

19. Scoles and Stephens, *The Proposed Uniform Estate Tax Apportionment Act*, 43 MINN. L. REV. 907 (1959), is a useful analysis.

20. 240 S.C. 347, 126 S.E.2d 15 (1962). This case is also noted in the Administrative Law section at note 32 and in the Constitutional Law section at note 38.

21. Note, *Income in Respect of Decedents: The Scope of Section 126*, 65 HARV. L. REV. 1024 (1952).

22. Int. Rev. Code of 1939, § 126, now contained in INT. REV. CODE OF 1954, § 691.

23. The taxpayer argued, Brief for Appellant, p. 5, Heyward v. South Carolina Tax Comm'n, 240 S.C. 347, 126 S.E.2d 15 (1962), that the installment

tion of South Carolina[24] and that of the United States[25] were also raised. The trial court found that, although the Tax Commission had not published its regulation until August 10, 1960, it had followed this rule since before 1955, and that the promulgation of such a rule was authorized by statute.[26]

The trial court pointed out the following chronology of events relating to the instant problem: (1) Since before 1955, the Tax Commission had followed the practice of permitting a taxpayer to elect the installment basis, where he could comply with the conditions imposed thereon by federal statutes; this election included the requirement that if the taxpayer died, all unpaid installments became income in his final return. (2) In 1960, the General Assembly amended Code Section 65-63[27] to require that the Tax Commission publish its regulations. (3) To comply therewith, the Tax Commission on August 10, 1960 published a regulation relating to installment sales.[28] (4) The General Assembly in 1961 enacted a statute permitting the installment method in this state, effective as to tax years beginning after December 31, 1960. This same statute adopts an income in respect of a decedent rule, like the federal rule, which provides that the unpaid installments would not be income to the decedent resulting from his death, but would be income to the estate or the beneficiary who ultimately collected the installment.[29] It is obvious that (2), (3) and (4) above have no relation to the instant case, except insofar as they may shed light on the reasonableness

method was the most accurate method for determining income and was the method of accounting adopted by the taxpayer.

24. S.C. CONST. art. I, § 5 (due process and equal protection of the laws clause). Taxpayer also argued that the method urged by the Tax Commission would constitute double taxation.

25. U.S. CONST. amend. XIV, § 2.

26. S.C. CODE, §§ 65-63—65-64 (1952) were cited by the court. Section 65-207 was another provision on which reliance might be placed. The numbers are the same under the 1962 Code, but amendments have been made, principally to require publication of the regulations.

27. Both the trial judge and the Supreme Court emphasize this section, which is found in Chapter 2, headed "South Carolina Tax Commission." Equally entitled to weight is § 65-207, which read under the 1952 Code: "Regulations. The Commission may, from time to time, make such rules and regulations, not inconsistent with this chapter, as it may deem necessary to enforce its provisions and such rules and regulations shall have full force and effect of law." The 1960 Amendment thereto added the words "and publish" after the word "make." This section is found in the sections devoted to the income tax.

28. The regulation permitted election of the installment method if the seller met all the qualifications for an installment sale as set forth in the Internal Revenue Code. The last sentence of the regulation read: "Also, any balance of an installment sale must be reported on the final return of a deceased taxpayer."

29. S.C. CODE § 65-286 (1962); subsection (4) provides the rule for income in respect of decedents.

of the Tax Commission's informal (unpublished) regulation. The trial court held that the Commission was not estopped by having permitted the installment method, that it had power to make rules of procedure of this sort, that this rule was reasonable and valid, and that taxpayer's arguments relating to constitutionality were without merit.[30] He noted that the method adopted by the Commission was based on practical necessity,[31] and was the method used by the federal procedure before amendment of federal law in 1942.[32]

On appeal, the Supreme Court of South Carolina reversed, on a ground that does not appear to have been raised in the appellant's exceptions or his brief. The court held that the unwritten regulation of the Tax Commission permitting the installment method of return was invalid, being in effect the enactment of law by the Commission. "Whether the taxpayer could have been required to report the entire profit as income for 1956, the year of the sale, is not before us for decision and we express no opinion thereabout."[33]

As applied to an unpublished, informal regulation, there may be some merit in this view; the taxpayer electing the installment method may well not realize that he was committing himself to technical accrual of the unpaid balance in the event of his death. With regard to the immediate problem, the 1961 statute respecting installment sales takes care of the problem, taxing the income to the ultimate recipient, as does the federal law.[34]

Thus the importance of the instant decision may be not in its immediate area, but in the attitude of the courts towards the regulation-making power of the Tax Commission.[35] It is to be

30. The opinion is printed in the Transcript of Record, pp. 10-16, Heyward v. S. C. Tax Comm'n, 240 S.C. 347, 126 S.E.2d 15 (1962).

31. *Id*, p. 14: "The defendant has presented cogent argument in support of the practical necessity for the limitation upon its regulation in that the death of the taxpayer causes an administration of the estate with the result that unless the taxes are assessed and claim filed therefor with the Probate Court within the time allowed by law, the entire estate would be distributed before the other installments would fall due and thereby jeopardize any claim for income taxes. The assets in the hands of distributees would not be charged with liability for a tax of the testate, which was not assessed and not reduced to claim or lien status. Sections 19-473 and 19-474 of the 1952 South Carolina Code."

32. See Helvering v. Estate of Enright, 312 U.S. 636, 85 L. Ed. 1093 (1941).

33. Heyward v. South Carolina Tax Comm'n, *supra* note 20 at 356, 126 S.E.2d at 20.

34. S.C. CODE § 65-286(h) (1962); INT. REV. CODE OF 1954, § 691.

35. The problem is equally acute under federal law. Classic statements are found in Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398 (1941) and Paul, *Use and Abuse of Tax Regulations in Statutory Construction*, 49 YALE L. J. 660 (1940).

hoped that the Supreme Court will take a more sympathetic view toward regulations made under the grant of authority in the 1960 statute,[36] requiring publication and compilation of regulations. Wise administration of the revenue laws frequently requires the making of seemingly arbitrary rules, often without explicit support in the statutes.[37] Yet in many cases, some choice must be made, and the judgment of the General Assembly that considerable discretion in making that choice should rest in the Tax Commission should be honored. Lawyers and accountants as well as individuals throughout the state are looking to the Commission for guidance in preparation of returns.

Consider the instant case. Would it be fair and just to taxpayers to say that A "received" the entire 40,000 dollars in 1956, and therefore realized 39,000 dollars gain in that year? If not, what alternative is there to saying that he realizes gain as he receives the payment of the notes? But if this course is permitted the taxpayer, and if the statute seems to permit the unpaid portions to escape tax altogether unless they are taxed in the final return of a decedent to whom they are owed, then would any other result than that selected by the Tax Commission in the regulation not frustrate the intention of the General Assembly, expressed in Section 65-251?

Admittedly the problem of the validity of regulations is a difficult one. In 1941, Dean Griswold noted[38] "the deep confusion in which this field is now engulfed" (referring to the federal cases). Two decades have not materially lessened the difficulty. The central question, that to which the Supreme Court of South Carolina addressed itself in the instant case, continues to be whether the regulation is merely "interpretative" of the statute or is "legislative" and beyond the rule-making power.[39] In entertaining this and other questions concerning the validity of regulations, the court might in the light of the amended statutes take a fresh look at the problem. The will of the General Assembly as expressed in these statutes giving the rule-making power, and the peculiar needs of the revenue collecting process, require a sympathetic consideration of tax regulations.

36. *Supra,* note 27.

37. In the instant case, the Supreme Court said, "It is perfectly apparent to us that the respondent, by the foregoing regulation, attempted to adopt as the law of this State the installment method of reporting income for income tax purposes as such is set forth in the Federal income tax laws . . . ." 240 S.C. at 355, 126 S.E.2d at 20.

38. Griswold, *supra* note 35, at 410.

39. A well-known decision in the federal area is Commissioner v. Clark, 202 F.2d 94 (7th Cir. 1953), holding that the Clifford Regulations were beyond the regulation-making power.

2. Tax-free "reorganization, consolidation or merger"

Stephenson Fin. Co. v. South Carolina Tax Comm'n[40] was one of four companion cases involving related taxpayers and the same problem of statutory interpretation. Stephenson Finance, a publicly held South Carolina corporation, was engaged in the auto finance and small loan business. The corporation sought to acquire affiliates in the credit life insurance and automobile insurance businesses and entered negotiations with Superior Life, a South Carolina corporation engaged in credit life business, and Superior Auto, a South Carolina corporation engaged in writing physical damage insurance on automobiles. Taxpayer[41] company was a shareholder of both of these corporations, and it surrendered all its shares in the two corporations for shares in Stephenson Finance, which in this and similar transactions acquired all of the shares of both corporations, giving up solely its own shares. The fair market value of the shares acquired by the taxpayer exceeded the basis of the shares surrendered in the other two corporations, so the Tax Commission asserted that the gain was taxable. Taxpayer asserted that the transaction came within provisions of South Carolina law postponing the recognition of gain on transactions involving a "reorganization, consolidation or merger."[42] The trial judge so held, finding the transaction within the cited statutes and the gain to be merely "paper profits," not taxable.[43] On appeal, the Supreme Court reversed. As in the *Heyward* case, the rule laid down in this case has now been resolved by a specific statute,[44] changing the result for future cases.

The Supreme Court held that the word "reorganization" could not apply to a situation in which a corporation simply acquired the shares of two other corporations, with no "impairment of the corporate existence or functions of any of the three corporations."[45] Nothing technically approaching a "consolidation" was present, since statutory requirements were not met. But the court

40. 242 S.C. 98, 130 S.E.2d 72 (1963).

41. This statement of facts relates to only one of the four related cases, the *Superior Automobile Insurance Company* case, but the other three cases posed identical problems of statutory construction.

42. S.C. CODE §§ 65-604, 65-275, 37-130.51, 65-931 (1952) were involved in the four cases. Each contains or incorporates by reference this language.

43. The opinion is found in Transcript of Record, pp. 52-69, Stephenson Fin. Co. v. South Carolina Tax Comm'n, 242 S.C. 98, 130 S.E.2d 72 (1963). The reference to "paper profits" is found on page 58.

44. S.C. CODE § 65-275 (1962).

45. 242 S.C., 103, 130 S.E.2d, 74.

found that the consolidation statute[46] was also intended to govern mergers, and that no "merger" could be accomplished without compliance with the statute. Hence, the transaction failed to meet the test of the tax statute for non-recognition of gain.

3. Taxation of Insurance Companies—"Investment Net Income"

Superior Life Ins. Co. v. South Carolina Tax Comm'n,[46a] a related case to the *Stephenson Finance* case, involved a now repealed statutory provision,[47] that taxing insurance companies on their "investment income." The company involved sold its entire industrial debit insurance business, and its small loan business in a later transaction, to Calhoun Life Insurance Company, retaining its other lines of insurance activities. Taxpayer company had expended $308,127.32 in building up these two businesses, and the sum of the sales prices received by the company was $289,178.00. Taxpayer did not return any "investment income" under the statute, since he claimed the two transactions resulted in a loss of $18,949.32. The Tax Commission claimed that the so-called investment in the business was not really "cost" but "operating losses" which had already been deducted by the company on earlier tax returns. The Supreme Court did not need to consider this question, however, since it found that the income if any was not "investment income" within the statutory definition. The court said, Mr. Justice Lewis writing the opinion:[48]

> The legislative intent to exclude from investment income the income derived from the normal operational activities of the company is evident from the wording of the statute; for the statute excepts from investment income that which arises from "premiums paid for insurance contracts," the primary income of an insurance company.

This reasoning is similar to that employed by courts in several cases involving the question whether certain receipts were ordinary income or capital gain.[49] Restated, it could be argued that since the statute taxes "investment income," the normal "operational income" such as premiums is excluded from tax. The

46. S.C. CODE § 12-451 (1952).
46a. 241 S.C. 470, 129 S.E.2d 128 (1963).
47. S.C. CODE §§ 65-931 to 65-936 (1952).
48. 241 S.C. at 473, 129 S.E.2d at 130.
49. A leading federal case is Hort v. Commissioner, 313 U.S. 28, 85 L. Ed. 1168 (1941).

amounts received for sale of the business were simply "in lieu" of such "operational income."

B. INDICTMENT FOR FALSE AND FRAUDULENT RETURN—VENUE

In *State v. Gasque*,[50] indictments by the Grand Jury of Richland County charged that defendant filed false income tax returns for the years 1956 and 1957, making major understatement of his income. The defendant and the state entered a stipulation of fact, that defendant was a resident and a practicing attorney in the County of Marion, that the income referred to in the indictments was earned there and received there, that the tax returns were prepared, signed and delivered in Marion County, not in Richland County, to an agent of the Tax Commission, and that the agent filed the returns in Columbia, in Richland County. Defendant moved to quash the indictments on the ground that he was a resident of Marion County, the offense, if any, was committed in Marion County, and he was entitled under the constitution of this state[51] to be tried in that county. In the alternative, the defendant asked for a change of venue. The trial judge granted the motion to quash the indictments, finding that all acts necessary to commission of the offense had been committed in Marion County, since delivery to an agent of the Tax Commission gave the Commission knowledge of the contents of the documents with the allegedly false statements of income. The venue statute cited by the state[52] was held to be inapplicable, since it applied only to omissions of acts, such as failure to file any return, not to affirmative misstatements. The court felt that any other construction of this provision might violate the cited constitutional provision, and should be avoided.

On appeal, the Supreme Court, per Mr. Justice Moss, affirmed, finding itself in agreement with the views expounded by the trial court. The state argued the doctrine of *Lightfoot v. Texas*,[53] that if filing were in Richland County, part of the offense was committed there. It then argued statutory language[54] to show that filing was in Columbia, in Richland County. The Supreme

50. 241 S.C. 316, 128 S.E.2d 154 (1962).
51. S.C. CONST. art. I, § 17.
52. S.C. CODE § 65-366 (1952).
53. 80 S.W.2d 984 (Tex. 1935). In that case, defendant was convicted of filing a false motor vehicle fuel report; he mailed the false report in Comanche County to the public official at the capital in Travis County. The court held that the offense was partly "committed" in Travis County.
54. S.C. CODE §§ 65-61 (1952) (The Tax Commission shall keep its office at the Capital); S. C. Code § 65.303 (1952) (Tax returns shall be filed with the Commission).

Court found this position unsound, however, since the statute recognized that the Tax Commission could employ persons to represent it in other sections of the state.[55] The decision leaves open the question of the constitutionality of the venue provision relating to complete failure to file a return.

C. REAL ESTATE RE-ASSESSMENT

In *Hampton v. Dodson*,[56] taxpayers in School District No. 1 of Richland County sued to enjoin public officials from proceeding to reassess real estate in the district, asserting, first, that Acts Nos. 952, 968, and 976 of the 1958 General Assembly were unconstitutional on their face; and second, that they were unconstitutional as administered by the assessment board. Act No. 952 had created the Richland County Board of Assessment Control, giving it certain duties, effective only to School District No. 1. It had also created the County Board of Assessment Appeals, with countywide jurisdiction, transferring to it the duties of the Board of Equalization. According to 1960 statistics, 89.6 percent of the assessed value of realty in Richland County was within School District No. 1. It was believed that there were gross inequities with respect to assessment, and the act aimed at reducing such inequities.

The gist of the argument of taxpayers was that they were being subjected to a program of scientific assessment by trained appraisers, whereas no such reassessment program was being undertaken with trained appraisers in other school districts in Richland County. Testimony was taken before a master, who filed his report. The circuit court affirmed his report with minor modifications, and the Supreme Court affirmed.

The court found that the assessing program of the new Board was being carried out in accordance with statutory standards of valuation of property, and was completely consistent with the general statutory law on assessment, hence there was no violation of the taxpayers' constitutional rights. Since this was so, the expenditure of public moneys to finance the new Board, which taxpayers also challenged, was found to be necessary and proper to carry out the law, and hence not unlawful.

55. S.C. Code §§ 65-62, 65-59 (1952).
56. 240 S.C. 532, 126 S.E.2d 564 (1962).