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Bond Issues

Mims v. McNair[1] is one of a long series of cases testing the constitutionality of state bond issues without popular referendum, but the arguments disclosed a significant extension of the Special Fund Doctrine used to validate earlier bond issues. The plaintiffs sought to enjoin the issuance of State Capital Improvement Bonds pursuant to 1968 legislation[2] which purported to authorize the issuance of bonds in an amount not exceeding $70,000,000 and pledged to the payment thereof the revenues from the state income tax.[3] The constitutional basis of the taxpayers' position was that the Act violated article X, section 11, of the South Carolina Constitution, which prohibits the creation of any debt by the state unless the question of the creation thereof is first submitted to the qualified electors of the state at a general election and approved by two-thirds of those voting. The supreme court, in affirming, adopted and set forth in full Judge Grimball's decree below in favor of the validity of the Act.

The General Assembly has since the fortunate decision in *State ex rel Richards v. Moorer*[4] some forty years ago employed, with the blessings of the court, the Special Fund Doctrine to sidestep the restrictions placed on it by frugal Ben Tillman in 1895. According to the court:

> It is now well settled that the General Assembly may [authorize bonds without referendum] *where such obligations are secured by the pledge of a fund established or set aside which is reasonably sufficient to pay such obligations without resorting to the levy of a property tax.*[5]

The major contest arose when the taxpayers asserted some five reasons why the Special Fund Doctrine could not apply to the 1968 Act. The Court firmly rejected each argument. Yes, there was a "fund set aside" — the pledge of future income tax rev-

1. 165 S.E.2d 355 (S.C. 1969).
2. LV S.C. Stats. at Large 3175 (No. 1377, 1968), relating to student and faculty revenue bonds for South Carolina State College and bonds for the TriCentennial Project.
3. Title 65, Chapter 5, S.C. Code Ann. (1962).
4. 152 S.C. 455, 150 S.E. 269 (1929).
5. Mims v. McNair, 165 S.E.2d 355, 359 (S.C. 1969), *quoting* Arthur v. Byrnes, 224 S.C. 51, 57, 77 S.E.2d 311, 313 (1953) (emphasis added).

enues was sufficient. Yes, it was permissible to issue additional bonds hereafter — this was upheld for highway bonds[6] and for school bonds.[7] Yes, the fund was "reasonably sufficient" as long as the revenues pledged were in one year 150% of the maximum annual principal and interest requirements for the next year of all the bonds to which the revenues were pledged — this 150% coverage was declared adequate in the same highway and school bond cases. Yes, the revenues from the income tax would fluctuate with business conditions — but this fluctuation also occurs with the state retail sales tax involved in the school bond case.

Yes, on the most significant, *new* question, the pledge of the revenues for the new bonds was subordinate to a prior pledge of all these revenues to the State Port Bonds[8] — but only the overall sufficiency of the revenues was material. Though the question of the priority of the pledges had never been raised before, in *Richards*, the original Special Fund Doctrine decision, the pledge was a subordinate pledge. Herein lies the significance of the decision. Gone is the necessity for a "special fund" in any real sense. Only revenue potential adequate to cover principal and interest payments is required. Although this may well be the wisest course in the oft-charted but still uncertain waters of public debt flotation, it is a long step away from the concept of a "fund set aside".[9]

In *Holland v. Kilgo*[10] the supreme court affirmed a declaratory judgment denying an injunction on the issuance of $2,800,000 worth of general obligation bonds of School District #5 of Lexington and Richland Counties. This unique school district was organized in 1952 by the county boards of education in the two counties and includes land in both. Article X, section 5, of the Constitution set as a limitation for bond issues eight percent of the assessed value of all taxable property in the school district. A 1969 amendment[11] purported to raise the limitation to thirty percent, but referred to the school district variously as "School District #5 of Lexington County and School District #6 of Richland County" and "the districts". The court held that

6. State *ex rel* Richards v. Moorer, *supra* note 4.
7. State *ex rel* Roddy v. Byrnes, 219 S.C. 485, 66 S.E.2d 33 (1951).
8. The income tax pledged in 1956 to the payment of the oustanding $13,700,000 worth of State Port Bonds upon which the annual debt service is less than $1,700,000.
9. The Special Fund Doctrine itself seems a long step away from the concept of article X, section 11.
10. 168 S.E.2d 569 (S.C. 1969).
11. R3, Jan. 28, 1969. The limit had been raised several times prior to 1969.

neither the use of the plural word districts nor the reference to the older districts barred the success of the attempted amendment.

On the authority of *Tindall v. Byars*[12] the court stated generally that constitutional amendments should be interpreted to effect the purpose for which they are obviously intended. The obvious purpose was to liberalize the debt limitation for the people in a certain area. Use of the older district titles was sufficient to identify the area. The court also relied on *Tindall* in dealing with the misuse of the plural form. The older case upheld creation of a single county-wide school district under an amendment enabling the Chester County Board of Education to prescribe the area of county school districts.

The court also approved submission of the amendment only to the voters in the two counties, without a vote by the statewide electorate. Article XVI, section 1, of the constitution instructs that:

> A proposed amendment providing for a change in the bonded debt limitation of a county or any of its political subdivisions shall be voted on only by the qualified electors of such county.

School District #5 is not a political subdivision of a single county. But on the authority of *Mungo v. Schedd*[13] the court divided the district into two portions and considered each part a political subdivision of the respective counties.

TAXATION

In *United States Fidelity and Guaranty Co. v. Columbia*[14] four insurance companies sought partial refunds of monies paid to Columbia as business license fees. Prior to 1965, S.C. CODE ANN. § 47-407 (1962) limited business and professional license fees in cities of 70,000 people or more to a $2500 maximum fee.[15] In 1965 the General Assembly amended the section to exclude cities of 90,000 people or more. "The single effect of this amendment

12. 217 S.C. 1, 59 S.E.2d 337 (1950).
13. 247 S.C. 195, 146 S.E.2d 617 (1966). The court used the rationale outlined in the text to sustain a bonded indebtedness of 15% in this same district, over the 8% limit set in 1895, but under the 20% limit in Lexington and matching the 15% limit in Richland.
14. 165 S.E.2d 272 (S.C. 1969).
15. S.C. CODE ANN. §§ 47-173 and 47-271 provide for assessment of business taxes by towns with under 1000 and over 1000 people respectively—without specific limitation. Both sections do require, however, any taxes levied to be reasonable and graduated either according to gross income or capital investment.

was to allow the City of Columbia to remove the maximum limitation, . . . [since] [a]dmittedly the only city in South Carolina having more than 90,000 inhabitants according to the latest United States census was Columbia."[16] In 1966 Columbia enacted a license tax of two percent of gross premiums for casualty and fire insurers. The plaintiffs were assessed fees from seven thousand to twelve thousand dollars each in 1966.[17]

The South Carolina Supreme Court held that the 1965 amendment was "special legislation" in violation of article III, section 34, subsection ix, of the South Carolina Constitution, and thus the ordinance was subject to the former $2500 limit. Subsection ix prohibits enactment of local or special laws where a general law can be made applicable. Columbia conceded that a general law could be made applicable, but contended without success that the amendment was also such a general law. The court disagreed, reaffirming the long-standing principles, first that a law general in form but special in operation is unconstitutional, and second that the legislature cannot escape the constitutional proscription by creating an arbitrary classification.[18]

The classification as it stood before 1965 was upheld in *Glens Falls Insurance Co. v. Columbia*.[19] The legislature presumably intended to prohibit the imposition of an unreasonable or unconscionable tax. In the words of the court in 1963, "Since the assessment of the tax was graduated as to income, the payment of an unreasonable license tax in cities of smaller population was no doubt considered unlikely."[20] The line of demarcation at 70,000 people is within the discretion of the legislature.[21] But there is no reason for putting cities with over 90,000 people in a dif-

16. United States Fidelity & Guar. Company v. Columbia, 165 S.E.2d 272, 273 (S.C. 1969).
17. *Id.*
18. *Id.* at 275.
19. 242 S.C. 237, 130 S.E.2d 573 (1963). In *Glens Falls* Columbia attacked the demarcation as "special legislation," since smaller cities had no specific limitation; see note 2 *supra*. The court said:

> The limit of judicial inquiry in a case of this kind is whether the classification on the basis of population "bears any reasonable relation to the subject. . . . Unless the classification . . . is plainly illusory or may be applied illusively, the judgment of the legislature must prevail." *Id.* at 244-45, 130 S.E.2d at 577 (citations omitted).

Brailsford, J., concurred on the grounds that the constitutional point had not been properly raised, but expressed "grave doubt" as to the reasonableness of the demarcation.
20. Glens Falls Ins. Co. v. Columbia, 242 S.C. 237, 245, 130 S.E.2d 573, 577 (1963).
21. The taxation scheme is subject to criticism. What is reasonable is not determined solely by the amount of the tax, but by the amount in proportion

ferent class from cities between 70,000 and 90,000. In fact, the amendment is entirely inconsistent with the original legislative intent as identified by the court: levies over $2500 are most likely in the largest cities.

AMENDMENTS

The Amendment Process.

Heretofore, article XVI, sections 1 and 2, which in practice govern amendment of the South Carolina Constitution, have required that amendments be *individually* considered and processed.[22] As a prelude to the introduction of the proposals of the Constitution Study Committee[23] and possible recommendation of those proposals to the people, the General Assembly has moved to alter this requirement. Section 1 has been amended to provide for, in the general elections of 1970 and 1972 only,

> revision of an entire article or the addition of a new article . . . as a single amendment with only one question being required to be submitted to the electors. Such amendment may delete, revise and transpose provisions from other articles of the Constitution provided such provisions are germane to the subject matter of the article being revised or being proposed.[24]

As noted above, formerly amendment had in effect to be section by section, if the referendum procedure were used.[25] Otherwise resort to constitutional convention[26] was necessary. Such

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to, *e.g.*, the amount of premiums, of profits, of business. A legislature opposed to unreasonable taxes should be more concerned with small cities with license fees over $2,500 than large cities.

In the United States Fidelity & Guar. Co. v. Greenville, 250 S.C. 136, 156 S.E.2d 417 (1967), two insurers sought refunds from Greenville, a city under 70,000 and subject to § 47-371, not § 47-407. Plaintiffs contended that imposition of a license tax over $2,500 was excessive and unreasonable in violation of the legislative intent as reflected in § 47-407. The court refused to read in a limitation that the law did not expressly contain.

22. The procedure is for the proposal to be affirmed by two-thirds vote in each chamber of the legislature, then to get majority support at a statewide general election referendum, and then to be ratified by two-thirds of each chamber. A 1967 amendment requires only a county wide referendum when the question is the bonded debt limitation for one county.

23. The committee was formed in 1966 and is composed of the Lieutenant Governor, three senators, four representatives and four gubernatorial appointees.

24. R61, March 5, 1969.

25. Article XVI, section 2 requires a ballot in such form "that the electors shall vote for or against each of such amendments separately." Section 2 was not specifically amended, probably because its very terms would require two amendments. However, it has very likely been amended by implication.

26. Article XVI, section 3 provides that the legislature and the people can vote for a convention by means of the same triple voting procedure necessary for single amendments.

cumbersome machinery undoubtedly served the purposes of certain interests.[27] However, the degree to which the new procedure will facilitate badly needed constitutional revision should be obvious and welcome.

Divorce.

By virtue of an amendment to article XVII, section 3,[28] and the implementing statute,[29] "continuous separation for a period of at least three years" became the fifth ground for divorce in South Carolina. This is a bold step for this historically conservative jurisdiction. The four existing grounds — adultery, desertion for a period of one year, physical cruelty, and habitual drunkenness caused by alcohol or by narcotics — have been permitted only since 1949.[30] Before that date there had never been legal divorce in the state except for a six-year period during Reconstruction.[31] This is indeed a bold step: the new provision allows divorce by mere consent of the parties, while in the past only serious misconduct by one partner could justify dissolution of the marital bond.[32]

Addiction.

Diversion of liquor tax revenues from school purposes to the treatment and rehabilitation of alcohol and drug addicts may occur in the future. An amendment[33] to article XI, section 12, which deals with education, provides that with respect to any increase in license fees and taxes after July 1, 1969, all or any portion of the additional revenue may be applied to such purposes. The section now provides that funds remaining after statutory appropriations to the counties may go for state school purposes.

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27. In Moffett v. Traxler, 247 S.C. 298, 305, 147 S.E.2d 255, 259 (1966), the court indicated that the purpose of the several provisions is to "provide every safeguard against log rolling, surprise, and fraud in the adoption of constitutional amendments. . . ."
28. R116, March 5, 1969.
29. R258, May 2, 1969.
30. In 1949, Article XVII, § 3 was amended to allow divorce on these four basic grounds, though without specifying the period of desertion or the two causes of drunkenness. S.C. CODE ANN. § 20-101 (1962) now controls.
31. Sumner, *The South Carolina Divorce Act of 1949*, 3 S.C.L.Q. 253, 253-59 (1951). This excellent short article indicates that Article XIV, § 5 of the Constitution of 1868 permitted divorce "as shall be prescribed by law." A statute establishing the grounds of adultery and desertion for two years was enacted in 1872 but repealed in 1878. In 1895 the new constitution prohibited all divorce.
32. See the *Survey of Domestic Relations* in this issue.
33. R115, March 5, 1969.