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Miscellaneous

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MISCELLANEOUS

I. Capacity of County Board to Sue

Westbrook v. Hayes[1] was an action brought against the Board of Commissioners of Spartanburg County. Pursuant to powers vested in it by the General Assembly of South Carolina,[2] the Board determined that it would make no appropriation of funds to the Spartanburg County Tuberculosis Hospital after August, 1969. The hospital's board of trustees brought an action invoking the original jurisdiction of the South Carolina Supreme Court, and a temporary injunction was issued against the Commission. The supreme court subsequently held, however, that "the Board of Trustees is without capacity to maintain the instant action and that such should be dismissed, thus making unnecessary a discussion or decision of the other issues raised."[3]

The hospital board argued, essentially, that the county commission's denial of a new appropriation to them should be ruled invalid, because the Commission was not explicitly empowered to terminate the existence of the hospital (which was established by the South Carolina General Assembly).[4] The petitioner argued that the Commission could not do in fact what it could not do by law; it could not, by cutting off funds, accomplish that which the General Assembly had not specifically delegated authority to it to do.

However, before the supreme court would consider the question of the scope of power of the Commission, it examined the scope of power of the Board of Trustees and concluded:

> The Board has not called to our attention any statutory provisions, or other authority, which purports to give it the capacity to institute and maintain the instant

1. 253 S.C. 244, 169 S.E.2d 775 (1969).
2. Act of 1968, LV S.C. Stats. at Large 2455. Prior to this time, the Spartanburg County Delegation had annually appropriated funds to the hospital. The new commissioner was granted broad budgetary control, *inter alia*, over Spartanburg County agencies, commissioners, and boards. These powers included the right to levy taxes, make appropriations for various county departments, and control the expenditure of appropriated funds.
3. 253 S.C. 247, 248, 169 S.E.2d 775, 776 (1969). Among the questions left unresolved by the court's perfunctory dismissal of the hospital board's case were those whose resolution would affect the embryonic home rule concept and have a profound effect upon the newly created county commission's ambit of power. As the respondent pointed out, "[T]he result urged by Petitioners would undermine the foundations of the Home Rule principle, which are being laid throughout the State." Reply Brief of Respondents at 8.
4. XLIII S.C. Stats. at Large 74.

> action, and we are aware of none . . . . The act creating the Board has to be strictly construed and where there is a reasonable doubt as to the existence of a particular power, such doubt has to be resolved against the existence of such power.[5]

The court accepted the respondent's contention that the petitioner did not have the capacity to institute *this* action, but left to another day the question of whether the petitioner could institute and maintain *any* action. The court concluded that "[t]he Board is simply an agency, instrumentality, or department of the County of Spartanburg created by an Act of the General Assembly."[6]

The court reiterated the rule in South Carolina that a county can sue or be sued but stated that, since the respondents were to be regarded as "either Spartanburg County, or the duly authorized representative thereof, then it would follow that Spartanburg County is suing itself in this action, ..."[7]

II. POSSESSION OF ALCOHOLIC LIQUOR

Lewis v. Gaddy[8] was an action instituted by the South Carolina Alcoholic Beverage Control Commission to suspend the possession and consumption license (or to collect a fine of $700 in lieu of suspension) of the defendants, operators of Gaddy's Owl Club in Myrtle Beach, because of the illegal possession of legal liquor. The defendant's agent was accosted in the parking lot adjacent to the defendant's place of business and was asked to allow a search of his automobile; subsequently, agents discovered a quantity of legal alcoholic liquors. The Commission found as a fact that the defendant's agent illegally possessed legal liquor. The trial court, reversing, stated that Section 4-95 of the 1962 Code was not controlling and that the defendant was within his rights pursuant to Section 4-29 of the Code.

5. 253 S.C. 247, 248, 169 S.E.2d 775, 776 (1969).
6. *Id.*
7. *Id.* To this writer, the courts use of "standing" to avoid the necessity of considering issues important to the development of a sound "home rule" system is an example of issue-dodging via procedural pigeonholing. Who does have standing to institute an action questioning the Commission's use of its purse string powers? The taxpayers of Spartanburg County? The patients of the Hospital? Important questions concerning the validity of broad delegations of legislative power to quasi-legislative bodies — especially in light of the petitioner's allegation that no, or inadequate, standards were provided the Commission by the General Assembly with respect to funding — have gone unanswered.
8. 173 S.E.2d 376 (S.C. 1970).

On appeal the sole question before the court was whether the possession of the liquor was illegal, there being no question as to whether the possession was for an unlawful purpose. The crucial issue to be resolved by the court was the effect of section 4-29 upon section 4-95 of the South Carolina Code of Laws. The supreme court, affirming the holding of the trial court, held that the defendant's employee was in lawful possession of the alcoholic liquors.

The Code sections in question read as follows:

> Section 4-95. It shall be unlawful for any person to store or have in his possession any alcoholic liquors in his place of business other than a licensed liquor store.
> Section 4-29. A — Notwithstanding any other provisions of law, it shall be lawful . . . , for any person who is at least twenty-one years of age to transport, possess or consume lawfully acquired alcoholic liquor in accordance with the following:
>
> (1) Any person may transport alcoholic liquors to and from any place where alcoholic liquors may be lawfully possessed or consumed; . . . .
> . . . .
> (4) It shall be lawful for any person to possess or consume alcoholic liquors on the premises of any business establishment . . . provided the business establishment meets the following requirements:
> (a) the business is bona fide engaged primarily substantially in the preparation and serving of meals or furnishing of lodging; and
> (b) the business has a permit . . . .[9]

Section 4-29 was passed in 1967 and specifically repealed sections 4-96 and 4-402 of the 1962 Code; however, no mention was made of section 4-95. The supreme court stated that

> [s]tatutes in para materia, such as Code Sections 4-95 and 4-29, have to be construed together and reconciled, if possible, so as to render both operative . . . . All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose.[10]

9. S.C. CODE ANN. §§ 4-95 (1962), and 4-29 (Supp. 1970).
10. 173 S.E.2d at 378.

The Commission's position (supported by Justice Littlejohn's strong dissenting opinion) was, basically, as follows:

1. The legislature merely intended to amend the law only to the extent that customers at a licensed restaurant could possess and drink alcoholic beverages on the premises.
2. Since two other Code sections were specifically repealed by section 4-29, the inference arises that the legislature intended to retain section 4-95 and, thereby, accomplish the limited purpose articulated above.
3. In support of the above position, there is a well known rule that where a statute expressly repeals specific acts, the presumption arises that it was not intended to repeal others not specified.
4. Since the two sections are obviously in conflict, an interpretation must be rendered; and the only reasonable one, consonant with the intent of the legislature, is that section 4-29 should be restricted to allowing customers to possess and consume alcohol on the premises of a restaurant.

Contraspectively, the defendant argued and the court held:

> [I]t was the legislative intent and purpose to allow both the possession and consumption of alcoholic liquors upon the premises of a business establishment . . . notwithstanding the provisions of Code Section 4-95. Section 4-95 remains in full force and effect as to places of business not within the purview of Section 4-29, but was by Section 4-29 clearly modified so as to remove and exempt from the application of Sec. 4-95 the place of business here involved.[11]

The majority placed great emphasis on the phrases, "any person" and "notwithstanding any other law." The majority reasoned that

> had the General Assembly seen fit when it enacted Sec. 4-29 to prohibit possession, consumption and transportation by the proprietor or the employees of an establishment holding a possession and consumption per-

11. *Id.* at 379.

> mit, it could have easily done so. Instead, it repeatedly used the phrase "any person", excluding only persons under twenty-one years of age.[12]

In effect, the holding will allow the proprietor of a restaurant to maintain his own stock of liquor on the premises. What he can legally do with this liquor remains to be seen. The court also held that it was permissible to possess alcoholic liquors in areas adjacent to the premises in order to transport liquors to and from an establishment possessing a license.

III. ELECTION PROCEDURES

In *Yonce v. Lybrand*[13] the petitioner taxpayer instituted a suit praying for an injunction against the issuance of any bonds by the County Council of Edgefield County. The petitioner attacked the validity of a hospital referendum which was submitted to and approved by the voters of Edgefield County on November 5th, 1968. The referendum authorized the County Council of Edgefield County to issue general obligation bonds of that county up to a maximum of $400,000. The funds were to be used to construct a county hospital. The referendum also bestowed upon the county council the power to levy an annual tax for the operation of the hospital. The trial court sustained the election's legality.

The South Carolina General Assembly authorized a referendum in regard to the construction and operation of a hospital for Edgefield County in 1968 pursuant to the guidelines laid down in the 1962 Code of Laws.[14]

The act provided:

> The county council shall cause an appropriate notice as to such questions and elections to be published in a newspaper published in Edgefield County on at least three occasions, the first of which is to be not more than

12. *Id.* The reasoning employed by the majority to arrive at this conclusion is exactly the same as that urged upon them by the dissent with respect to implying repeal of section 4-95.

13. 173 S.E.2d 148 (S.C. 1970).

14. S.C. CODE ANN. § 14-115 (1962) provides:

> Notice of the holding of such an election shall be given, by publication thereof in some newspaper published in the County, at least once not less than fifteen days prior to the occasion set for holding the election. Such notice shall state:
> (1) the occasion of the holding of the election;
> (2) the location of the several polling places;
> (3) the qualifications imposed upon persons desirous of voting; . . . .

twenty-one days nor less than fifteen days prior to the general elections in November, 1968. The notice shall contain the following information:

(1) The questions to be voted upon,

(2) The qualifications imposed upon persons voting, and

(3) Such other information as may be required to fully apprise all persons of the nature of the questions to be voted upon.[15]

The earliest published notification appeared just 13 days prior to the election. The county council also admitted that the notice failed to state the qualifications imposed upon persons voting and failed to list the polling places. The respondent argued, however, that the general election itself was widely publicized and that the notices about the general election stated that each elector would be required to present registration certificates in order to be entitled to vote. These notices also included a list of the precincts and the names of their respective managers. The respondent predicated his entire argument on the unusually large turnout of voters (80% voted on the bond question, 76% on the tax question) which they contended was due, in large part, to concentrated publicity programs instituted by both the proponents and the opponents of the bond issue. This exceedingly large turnout,[16] the respondent concluded, constituted substantial compliance with the statutory requirements regulating contents of election notices.

The supreme court affirmed the trial court's decision and upheld the validity of the election.[17] The court, while ack-

15. 173 S.E.2d 148 (S.C. 1970).

16. Respondent compared the 80% and 76% figures with what it alleged to be the national average (50%) for voter participation. Respondent's Brief at 5.

17. 173 S.E.2d at 150. The conclusions reached by the supreme court comport both with the decisions of most states and with sound reasoning. Florida held valid a bond issue in which official notice was admittedly defective because publicity in general was very heavy, a large turnout of voters occurred, and there was no showing of fraud. State v. Sarasota County, 155 So. 2d 543 (Fla. 1963). Kentucky likewise upheld a bond election in which the deviation from the statutory notice requisites was much greater than that in the instant case (publication occurred on only three occasions whereas the statute required continuous daily publication for at least 30 days prior to the election.) The Kentucky court also noted that pre-election non-official publicity lent itself to voter cognizance and further added that such bond elections should not be invalidated by narrow constructions of statutes. Kenton County v. Ankenbauer, Kentucky 293 S.W.2d 873 (Ky. 1956). The above cases are posited upon de facto compliance with statutory requirements which were effectuated through private efforts and by the fact that the bond issue question took place during a general election.

nowledging that strict compliance with statutory requirements was the better route, rejected any inference from the record that a "single vote was lost or affected by failure to publish a notice in strict compliance with the statute. It is, instead, clearly inferable that the publicity actually brought to bear on the issue was far greater than would have been afforded by strict compliance alone."[18] The court cited with approval earlier South Carolina cases to the effect that, "unless the result of an election is changed or rendered doubtful, it will not be set aside on account of mere irregularities or illegalities."[19] The court also agreed with and upheld the proposition that an election will not be rendered invalid on a mere technicality absent some showing that some persons were deprived of their right to vote or the election outcome was changed or rendered doubtful as a result of such irregularity.[20]

Most fatal to the appellant's case was the court's support of the following general rule:

> The test for determining whether an election is invalidated for want of a notice prescribed by statute is whether . . . the voters have had knowledge of the election and full opportunity to express their will.[21]

In conclusion the court cited with approval the rule

> that, where the result of an election is not made doubtful nor changed, irregularities or illegalities, in the absence of fraud, will not cause the expressed will of the body of voters to be set aside, unless a constitutional provision is violated or it is specifically provided by legislative enactment that such irregularity or illegality shall invalidate the election.[22]

The court noted that there were no such vitiating exceptions in the present case.

18. 173 S.E.2d at 149 (S.C. 1970).
19. *Id.* at 149, *quoting from* State ex rel. Walsh v. State Board of Canvassers, 79 S.C. 248, 248, 60 S.E. 699, 700 (1908).
20. *Id.* at 149, *citing* Harrell v. City of Columbia, 216 S.C. 346, 58 S.E.2d 91 (1950).
21. Phillips v. City of Rock Hill, 188 S.C. 140, 198 S.E. 604 (1938). The appellant attempted to distinguish the present case from *Phillips* by labelling the statutory language in the latter as directory and that of the former as jurisdictional but to no avail. Brief for Appellant at 7.
22. 173 S.E.2d at 150, *quoting from* State ex rel. Birchmore v. Board of Canvassers, 78 S.C. 461, 59 S.E. 145 (1907).

IV. ABORTION

Section 16-87 of the South Carolina Code of Laws — an Act to provide for legal abortions under certain conditions[23] — was passed by the 1970 session of the General Assembly of South Carolina and amends previous Code sections 16-82 and 16-84.[24] The new abortion law allows a licensed doctor of medicine to perform an abortion in an approved hospital if:

> 1. there is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the mental or physical health of the woman; or
>
> 2. there is substantial risk that the child would be born with a grave physical or mental defect; or
>
> 3. the pregnancy is the result of alleged rape[25] or alleged incest and, here, only if such allegations are corroborated by an official investigative authority who has issued a warrant for the alleged offender based upon reasonable cause to believe such an act was consummated.

In addition, the Act prescribes a 90-day residency requirement and calls for the written consent of the woman and, if she is living with her husband, his written consent. The operating doctor must first seek the certified counsel of two non-associated doctors who have also examined the woman. In case of dire emergency, the consent of the husband and certification by the non-operating doctors may be waived; however, the latter, the

23. Abortion is very controversial. Criticism, both of older state statutes, and of recently passed "liberalized" laws, is rampant.

> The present abortion laws in the United States, no matter how liberal in form, succeed in imposing a code of moral conduct based largely upon Christian, and especially Roman Catholic Christian, approved religious views by law . . . we must abolish all religiously inspired legal prohibitions against abortions by physicians and leave the development and enforcement of morality to the various churches and their respective members. 46 CHICAGO-KENT L. REV. 102 (1969).

24. Section 16-82 made it a felony for anyone to aid or abet an abortion or premature labor if such act resulted in the death of the child or the woman. Exception was made in a case where the abortion was necessary to preserve the life of the woman or the child. S.C. CODE ANN. § 16-82 (1962). Section 16-84 made it a misdemeanor for any woman to abort the birth of a child or precipitate premature labor intentionally except where the life of the woman or child was in jeopardy. S.C. CODE ANN. § 16-84 (1962).

25. The question arises as to whether the alleged rape must be forceful, or if an allegation of statutory rape will suffice. If the latter is sufficient, some of the criticism visited upon recent reform laws is unwarranted in that this loophole would allow unmarried girls, not of age, to legally abort the birth of a bastard child. The alleged rape must have been reported within two days and the alleged incestuous sexual act within 60 days of alleged offenses.

certificate, must be forthcoming no later than 24 hours after the operation. Such therapeutic abortions must also be reported to the State Board of Health on the prescribed forms no later than seven days after the operation. The Act also stipulates that no physician or hospital can be compelled to perform such an operation and that civil liability shall not result from such a refusal.

Abortion—like prohibition and contraceptives before it; like euthanasia, homosexuality, and ectogenesis, after it—will most likely become a matter for the individual and his conscience, not the state. It is doubtful that any government will be able to impose effective restrictions which infringe upon an individual's procreative rights at this juncture or in the immediate future.

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