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South Carolina Constitutional Law

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SOUTH CAROLINA CONSTITUTIONAL LAW

I. EDUCATION

In *Hartness v. Patterson*[1] the Supreme Court of South Carolina held unconstitutional a statute which provides for the use of public funds as tuition grants for students attending church-controlled colleges. Act No. 1191 passed by the 1970 General Assembly[2] provides for the use of public funds as tuition grants to students attending independent institutions of higher learning. Twenty-one institutions in South Carolina meet the statutory definition in the Act; at least sixteen of those institutions "[A]re operated under the direction or control of religious groups or denominations." The Act creates a committee to administer the grants, sets forth eligibility requirements for students to receive grants, makes grants unavailable to any student enrolled in a course of study leading to a degree in theology, divinity or religious education, and sets out standards which the participating institutions must meet. The single issue before the court was whether such tuition grants to students attending those institutions controlled by religious or sectarian organizations, constitute the use of public funds in aid of such institutions, a use prohibited by Article XI, Section 9 of the South Carolina Constitution.[3]

The court first emphasized that the constitutional proscription does not distinguish between aid which is designed primarily to benefit the institution's *religious function,* and aid designed to benefit the institution in other respects. "If the use of the public funds aids the religious *institution,* it is prohibited." The court also noted that the tuition grants "[A]re paid to the student only as a member of the selected school," and that under the Act,

1. 255 S.C. 503, 179 S.E.2d 907 (1971).
2. 56 S.C. STAT. AT LARGE 2579 (1970).
3. S.C. CONST. art. XI, § 9, reads as follows:

> The property or credit of the State of South Carolina, or of any . . . other subdivision of the said State, or any public money, from whatever source derived, shall not, by gift, donation, loan, contract, appropriation, or otherwise, be used, directly or indirectly, in aid or maintenance of any college, . . . which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization.

> [Q]uite conceivably all, and most likely a majority, of the committee controlling the administration of the Act would come from the schools controlled by the religious groups.[4]

The court thus concluded that the tuition grants constitute aid to the participating institutions:

> Students must pay tuition fees to attend institutions of higher learning and the institutions depend upon the paymentof such fees to aid in financing their operations. While it is true that the tuition grant aids the student, it is also of material aid to the institution to which it is paid. . . .
>
> It is apparent that one of the main purposes of the tuition grant is to reduce the cost to a student for attending the private colleges and thereby attract additional students to their campuses so as to fill their vacancies in their student body. Such would have the effect of adding additional funds to their treasuries and thereby improve their financial status. . . . Such constitutes aid to the religious schools.[5]

Against a multi-faceted attack, the court in *Hunt v. McNair*[6] upheld the constitutionality of the Educational Facilities Authority Act,[7] a statute which authorizes the state budget and control board to provide financing for institutions of higher learning by the issuance of revenue bonds. Pursuant to the Act, the Baptist College of Charleston sought approval of the Authority for the issuance of up to $3,500,000 in revenue bonds, to be used for three purposes: first, to pay off certain outstanding indebtedness incurred in acquiring part of the college's physical plant; second, partially to reimburse the College's Plant Fund for equipment acquired and improvements made; and third, to refund an outstanding indebtedness of the College (the College's first mortgage serial bonds). The College proposed to convey land and facilities thereon to the Authority, which would then lease the land and facilities back to the College at a rental sufficient to meet the payment of principal and interest on the proposed bonds as they became due; that lease was to provide that the College, upon payment of the bonds, should reacquire the land and facilities at no additional cost. The plaintiff brought this suit as a taxpayer and as a resident, seeking a holding that the Act was unconstitutional.

4. 255 S.C. at 507, 179 S.E.2d at 909.

5. *Id.* at 507-8, 179 S.E.2d at 909.

6. 255 S.C. 71, 177 S.E.2d 362 (1970).

7. S.C. CODE ANN. §§ 22-41 to -41.7 (1970 Supp.), hereinafter referred to as "the Act."

Although the single issue in the appeal was the constitutionality of the Act and the validity of the actions taken pursuant thereto concening the College, there were actually seven distinct constitutional attacks presented, which are discussed separately herein.

The plaintiff first contended that the state's undertaking to finance private educational facilities was not a public purpose for which the state may issue bonds. The court noted that it is essential that the state's colleges and universities "[B]e provided with appropriate additional means to assist . . . youth in achieving . . . development of their intellectual and mental capacities," and concluded:

> The true purpose of the Act is to provide a measure of assistance and an alternative method . . . to accomplish this aim to the public benefit . . . of all the people of this State . . . If the general public benefit is the dominant interest served, constitutional demands are not offended, even though the aid inures to the benefit of a private institution.[8]

The plaintiff's second contention was that the Act violates the constitutional prohibition against pledging the credit of the state for private benefit,[9] and cited *Feldman & Co. v. City Council*[10] and *Bolton v. Wharton*[11] in support of his claim. The court distinguished *Feldman* and *Bolton* on the ground that the bond issues declared invalid therein were struck down solely because the bonds were payable from the proceeds of taxation. On the other hand, the Act in question in *Hunt* specifically requires that the bonds be paid solely by the participating college; on that basis the court concluded that the only funds pledged were the rental payments to be made by the College, that the state's credit could never be adversely affected, and therefore that the Act did not violate the constitutional proscription against pledging the state's credit for private benefit.[12]

The plaintiff's third argument, that the Act violates due process in that it "permits the expenditure of public moneys for the benefit of a private corporation," was disposed of by the court's holding that no

8. 255 S.C. at 78, 177 S.E.2d at 366.

9. S.C. CONST. art. X, § 6.

10. 23 S.C. 57 (1883).

11. 163 S.C. 242, 161 S.E. 454 (1931).

12. *See* Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967), which upheld the South Carolina Industrial Revenue Bond Act, S.C. CODE ANN. §§ 14-399.21 to -.35 (1970 Supp.), on similar grounds.

public money was to be expended in the construction, financing and refinancing under the Act.

The plaintiff next argued that the Act granted special privileges to the College (and to other institutions utilizing the Act), and in so doing violates the privileges and immunities section of the federal constitution. The plaintiff's theory was that those persons who do not qualify under the Act must pay a higher rate of interest, since the interest on bonds issued under the Act is not subject to income taxation. Noting its previous holding in *Elliott v. McNair,*[13] and the fact that the Act's true purpose is in aid of education and not in the conferring of special privileges, the court held that the provisions for favorable interest rates for those institutions qualifying under the Act, did not violate constitutional requirements of equal protection.

The plaintiff's fifth contention was that the College's option to repurchase the land and facilities from the Authority, violates public policy and the constitutional prohibition against the donation of public property.[14] The court refused to take such a narrow view of the option arrangement, but instead considered it to be but a part of the entire contract between the College and the Authority, and not as a separate contract arising subsequent to the issuance of the bonds.

The sixth and most significant constitutional attack upon the Act, was that it violates the constitutional proscription against the use of state property or credit in aid or maintenance of church-supported institutions.[15] Acknowledging that the College's operation is at least

13. 255 S.C. at 83, 17 S.E.2d at 368, *quoting from* 250 S.C. 75, 92-93, 156 S.E.2d 421, 430:

> [I]f the classification [of persons and property by the legislature] bears a reasonable relation to the legislative purpose sought to be effeced, and if the constituents of each class are all treated alike under similar circumstances and conditions, there is no infringement upon the equal protection clause of the Constitution. . . . The fact that a private corporation, coming within the provisions of the Act, may borrow money at a lesser rate of interest than others who do not qualify under the Act, does not afford any special privilege to such private corporation because the provisions of said act apply equally to all corporations within the class provided for in said Act.

14. S.C. CONST. art. III, § 31, reads as follows:

> Lands belonging to or under the control of the State shall never be donated, directly or indirectly, to private corporations or individuals. . . . Nor shall such land be sold to corporations, or associations, for a less price than that for which it can be sold to individuals.

15. S.C. CONST. art. XI, § 9.

partially controlled by the S.C. Baptist Convention, the court defined the essential issue as whether the proposed financing constitutes a loan or gift of the property or credit of the state in contravention of the state constitution. The court first held that state *property* was not involved, "[I]nasmuch as the State will acquire (at no cost to the State) a title subject to certain conditions, . . ." of which the College's option to reacquire the land and facilities was one such condition; noting its earlier conclusion that the *credit* of the state was in no way involved, the court held that the proposed arrangement under the Act did not violate the constitutional provision.

The plaintiff's final contention was that the State had unconstitutionally enacted legislation respecting the establishment of religion and prohibiting the free exercise thereof.[16] The court concluded:

> Having held that neither the credit . . . nor the property of the State is involved, it follows that this constitutional provision is not violated. There is no conflict between the preservation of religious freedom and the preservation of higher education under the Educational Facilities Authority Act.[17]

An Act[18] authorizing the issuance of bonds by the University of South Carolina to finance expansion and improvement of its football stadium, was held as constitutional in *Moye v. Board of Trustees.*[19] The Act was assailed on three grounds: first, that the special student fee provided for therein constitutes a tax which is not a uniform and equal tax and is therefore unconstitutional;[20] second, that the Act is an unconstitutional attempt to delegate the taxing power of the legislature to the board of trustees of the university;[21] and third, that the maintenance

16. S.C. CONST. art. I, § 4, reads, "The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ."

17. 255 S.C. at 86, 177 S.E.2d at 370.

18. 56 S.C. STAT. AT LARGE 2724 (1970) authorizes the issuance of $5 million of special obligation bonds for enlarging and improving the football stadium of the University of South Carolina. The Act provides inpart that, to insure the payment of principal and interest on the bonds, the trustees must impose a "special student fee" on each full-time student; the special student fee must be sufficient (after taking into account other sources of revenue) to provide for the payment of the principal and interest on the bonds.

19. 255 S.C. 46, 177 S.E.2d 137 (1970).

20. S.C. CONST. art. X, § 1, provides, "The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation. . . ."

21. S.C. CONST. art. III, § 1, provides, "The legislative power of this State shall be vested in two distinct branches, the one to be styled the 'Senate' and the other the 'House of Representatives,' and both together the 'General Assembly of the State of South Carolina.'"

and improvement of the football stadium is not a necessary and proper undertaking for an educational institution, and to require plaintiffs to pay such a special student fee to accomplish such a purpose as a prerequisite to obtaining an education, violates due process.

Concerning the first two attacks, the court concluded that the special student fee was not subject to constitutional limitations applicable to taxes. Finding statutory authority for such a fee,[22] the court noted:

> That the public treasury may be relieved of the cost of a permanent improvement to the extent of the student's contribution does not mean that the student is being taxed. Instead, he is simply paying a fee which, with other charges fixed by the Board of Trustees, is lawfully required of him for the high privilege of attending the University, which is heavily subsidized from the general revenues of the State.[23]

Concerning the due process and equal protection attack, the plaintiffs further urged that the special student fee was unreasonable and unfair because it must be paid by all students without regard to the actual use of the facilities by the individual students. The court simply noted an Iowa decision, which held, "The fact that a student may not participate or take advantage of every facility available does not mean that he is or or should be relieved from paying student fees allocated to various projects."[24] The plaintiffs also argued that further expansion of the stadium at the students' expense was unreasonable, when there was more than sufficient capacity to seat the entire student body in the present stadium; any further expansion of the stadium would only benefit the general public and not the students, and therefore the economic burden of the expansion should fall on the public rather than upon the students. The court suggested that the plaintiffs should carry such an argument before their legislators and before the Board of

22. S.C. CODE ANN. § 22-104 (1962) reads as follows:
> The Board of trustees of the University of South Carolina is and is hereby constituted a body corporate and politic, in deed and in law under the name of the University of South Carolina. Such corporation has the following powers:
>
> . . . .
>
> (9) To fix tuition fees and other charges for students attending the University. . . .

23. 255 S.C. at 51, 177 S.E.2d at 139.

24. *Id.* at 53, 177 S.E.2d at 140 *quoting from* Iowa Hotel Ass'n v. State Bd. of Regents, 253 Ia. 870, 114 N.W.2d 539, 544 (1962).

Trustees, "[I]n whose hands the power to make such policy decisions has been reposed."[25] The court thereafter concluded:

> It is not the province of the court to substitute its judgment for that of the authorities entrusted with the maintenance of the university unless it is clear that these authorities have acted in abuse of the powers vested in them.

Finding no such abuse of authority, the court held, "[T]he decision to improve Carolina Stadium violated no statutory or constitutional provision, expressed or implied, and was in compliance with 'due process of law.' "

In *Williams v. McNair*[26] a three-judge federal district court held that a statute which limits regular admission to Winthrop College to women, on the basis that certain courses are thought to be particularly helpful to female students, was not without rational justification and thus did not deny equal protection of the laws to ten male plaintiffs who sought admission to the college. The single issue before the court was whether the sexual discrimination in the admission of students to Winthrop, created by the statute governing the operation of the college,[27] was so arbitrary and wanting in rational justification that it offends the equal protection clause of the federal constitution.[28] Noting the division of pedagogical opinion on the matter, and the trend away from sexually-segregated education in this country, the court nevertheless cited stipulated facts to the effect that "[T]here is a respectable body of educators who believe that a single-sex institution can advance the quality and effectiveness of its instruction by concentrating upon areas of primary interest to only one sex." The court further concluded that the Constitution does not require that a classification keep abreast of the most current expert educational opinion, especially when there remains a respectable opinion to the contrary; on that basis the court held that the statutory discrimination was not devoid of reason.[29]

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25. *See* S.C. CONST. art. XI, § 8, which provides, "The General Assembly may provide for the maintenance of . . . the University of South Carolina . . . ." *See also* S.C. CODE ANN. § 22-104 (1962).

26. 316 F. Supp. 134 (D.S.C. 1970).

27. S.C. CODE ANN. § 22-401 *et seq.* (1962).

28. *See* McGowan v. Maryland, 366 U.S. 420 (1961).

29. *Id.* The court carefully distinguished Kirstein v. Rector and Bd. of Visitors, 309 F. Supp. 184 (D.C. Va. 1970), which held that the University of Virginia could not constitutionally limit admission to males. The *Williams* court's destinction was based upon the *Kirstein* court's emphasis upon the pre-eminence of the University of Virginia

II. IS THE ZOO UNCONSTITUTIONAL?

In *Gould v. Barton*[30] the plaintiff mounted a fourteen-point constitutional attack upon legislation establishing a special purpose district in Richland and Lexington counties, created for the purpose of issuing bonds for the construction of zoological and recreational facilities on land in the two counties. The court held, *inter alia,* that the legislation allowed an unconstitutional delegation of legislative power, that the special purpose district was therefore without a legally constituted governing body, and thus that the district was unable to function or issue bonds under the present legislation. The legislation establishing the district actually survived all but three of the fourteen constitutional attacks; each of the constitutional issues is summarized *seriatim* herein

In its 1969 and 1970 sessions, the General Assembly enacted several statutes establishing the Richland-Lexington Riverbanks Parks District (coterminous with Richland and Lexington counties) and a seven-member Riverbanks Parks Commission.[31] One of the legislative provisions attempted to define the geographical area in which the Commission might operate by authoizing the establishment of public recreation and zoo facilities "[W]ithin the territory in the counties of Richland and Lexington contiguous to the Saluda River and the Congaree River from Highway I-26 on the north to the Granby Locks on the south."[32] The constitutional attack involved was that, since the above description provides for no eastern and western boundaries, it was so vague and uncertain as to make it impossible to ascertain the geographical area over which the Commission's jurisdiction extends. The court noted that the legislative intent was not to define the Commission's jurisdictional area, but "to require that the authorized recreation and zoo facilities be located *within* the area described." The court held, "[T]here is nothing to indicate that the description is so vague and indefinite as to make it impossible to determine the location of the facilities *in accord with the legislative intent.*"[33] The court further

among that state's public colleges: "It is not intimated that Winthrop offers a wider range of subject matter or enjoys a position of outstanding prestige over the other State-supported institutions in this State whose admissions policies are coeducational." 316 F. Supp. at 138-139.

30. 181 S.E.2d 662 (S.C. 1971).

31. 56 S.C. STAT. AT LARGE 2599 (1970); 56 S.C. STAT. AT LARGE 639 (1969); 56 S.C. STAT. AT LARGE 391 (1969).

32. 56 S.C. STAT. AT LARGE 391, § 3 (1969).

33. Previously the court noted, "If the legislative intent can be determined with

found that, even if the disputed description were to be considered unconstitutionally vague, the difficulty was resolved by a more precise recital in the Act providing for the issuance of bonds by the Commission.[34]

The second constitutional question before the court was whether the construction of the proposed facilities upon land leased by the Commission from a private corporation, would violate the constitutional prohibition against pledging the credit of the state for the benefit of private concerns. The plaintiff contended that the improvements placed upon the leased property might become the property of the private lessor upon the expiration of the 99-year lease, resulting in benefit to the lessor derived ultimately from the pledge of the District's credit. The court found no evidence that the property would ever constitute a benefit to the lessor; the Commission received the land practically rent-free, for a valid public purpose, and most of the improvements would presumably be removable at the expiration of the lease.

Is there any constitutional prohibition against the creation of a special purpose district in order to finance the construction of a zoological park? The court answered the question in the negative, holding that such a park, in its recreational and educational aspects, serves a public purpose for which the legislature might create a special purpose district with the power to issue bonds.

Closely related was the plaintiff's fourth attack, that the proposed construction and operatin of the park was not a proper *county* function, and that the establishment of a special two-county district to construct the park was "an attempt to do by indirection that which cannot be done directly by one county."[35] The court considered that the attack was incorrectly based, in that it assumed that the primary function of the zoo was a recreational one. The court instead emphasized the educational nature of the project, a purpose for which a single

reasonable certainty, the statute will not be declared inoperative." 181 S.E.2d at 666. *See* Wingfield v. South Carolina Tax Comm'n, 147 S.C. 116, 144 S.E. 846 (1928).

34. 56 S.C. STAT. AT LARGE 2599, § 1 (1970): "The General Assembly further finds that the commission has acquired a tract of land consisting of one hundred sixteen acres on the Saluda River. . . ."

35. The plaintiffs based their contention upon the holding in Leonard v. Talbert, 225 S.C. 559, 83 S.E.2d 201 (1954), that a county cannot issue bonds for recreational purposes and upon that in Conner v. Charleston High School Dist., 191 S.C. 412, 4 S.E.2d 431 (1939), to the effect that a subterfuge to circumvent a constitutional prohibition will not be sustained.

county may issue bonds.[36]

The plaintiff also challenged the enabling statutes on the ground that they created overlapping districts to finance similar facilities:[37] more precisely, that the legislation created the Riverbanks Parks District, which overlaps a previously existing special purpose district created for similar or related purposes. The court noted a prior decision to the effect that there was no constitutional difficulty in the establishment of special purpose districts, provided that there is a reasonable basis upon which to distinguish between the nature and types of services and facilities to be provided by the respective districts.[38] Emphasizing the specialized facilities to be provided (zoo, botanical gardens, and aquarium), as well as the expertise required for the maintenance and operation thereof, the court concluded that there exists a sufficiently reasonable basis for a distinction between the Riverbanks Parks District and the other special purpose districts in the area:

> The jurisdiction of the Riverbanks Parks Commission is confined to the specified area where the Park will be constructed. The facilities to be constructed by it do not duplicate those proposed in the recreation districts. Therefore, the recreation districts and the Richland-Lexington Riverbanks Parks District will each operate within their respective territory in performing their distinct functions.[39]

The sixth constitutional issue before the court in *Gould* was whether a special 15% overlapping debt limitation applied to the Riverbanks District.[40] All parties agreed that the ordinary 8% debt limitation applied to the District, but there was some uncertainty as to the effect upon the District of earlier decisions concerning the 15% limitation.[41] After a survey of those decisions, the court concluded that the 15%

36. *See* Powell v. Thomas, 214 S.C. 376, 52 S.E.2d 782 (1949).

37. 181 S.E.2d at 669, *quoting from* Wagener v. Smith, 221 S.C. 438, 442, 71 S.E.2d 1, 4 (1952): "There cannot be at the same time, within the same territory, two distinct municipal corporations exercising the same powers, jurisdiction, and privileges."

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

39. 181 S.E.2d at 670.

40. S.C. CONST. art. X, § 5, limits the bonded debt of any county, township, school district, municipal corporation or political division, to an amount not to exceed 8% of the assessed value of all the taxable property therein.

41. Berry v. Milliken, 234 S.C. 518, 109 S.E.2d 354 (1959) (limitation inapplicable to district); Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88 (1947) (limitation applicable to district); Bagnall v. Clarendon & Orangeburg Bridge Dist., 131 S.C. 109, 126 S.E. 644 (1925) (limitation inapplicable to district).

limitation should be held inapplicable *only* in cases in which "[T]he purpose of the district was to fulfill some function which could only be properly performed by going beyond the boundaries of a single county." Concerning the Riverbanks Parks District, the court held:

> While the establishment of a zoo would serve a public purpose, ... [n]othing appears which would sustain a finding that such undertaking necessarily involves governmental interests extending beyond the boundaries of both counties.
>
> We therefore concluded that the 15% debt limitation . . . applies to the . . . Riverbanks Parks District.[42]

Concerning the 8% constitutional debt limit, the question arose: in computing the effect of the limitation, must the 8% ceiling be reduced by the bonded indebtedness incurred by the City of Columbia and by its underlying recreational districts? Noting that the District was formed to create a facility separate and distinct from those created by Columbia and the other recreational districts, and that the District was itself a separate and distinct corporate entity, the court held that the District was entitled to incur bonded indebtedness to the full 8% limit, unencumbered by the other bond issues.

The court also held that, in computing the District's 15% debt limitation, it was proper to exclude the bonded indebtedness of underlying subdivisions which are subject to special constitutional amendments increasing their capacity to incur bonded indebtedness.[43]

The plaintiff's ninth contention was that the inclusion of the City of Columbia within the District and the imposition of a tax upon the city's citizens to pay the District's bonds, imposes restrictions which are not imposed upon any other city of the same class, in violation of the state constitution.[44] However, the court viewed the purpose of the constitutional provision as follows:

> [T]o bring about uniformity in legislation affecting municipalities in the same classification and does not involve the power of the General Assembly to legislate with reference to subjects affecting

42. 181 S.E.2d at 672.

43. *See* Baldwin v. McFadden, 234 S.C. 563, 109 S.E.2d 579 (1959).

44. S.C. CONST. art. VIII, § 1, reads as follows:

> The General Assembly shall provide by general laws for the organization and classification of municipal corporations. The powers of each class shall be defined so that no such corporation shall have any powers or be subject to any restrictions other than all corporations of the same class.

> the relationship of the municipality or its residents to the balance of the State.[45]

Emphasizing that "The taxes are levied against the taxpayer as a resident of the district and not of the city," and that the legislation does not restrict, alter or impair any of the City's powers and functions, the court held that the constitutional provision was not violated.

The next four constitutional issues concerned the methods prescribed in the legislation for the appointment of members of the Commission. The seven-member Commission consists of two members appointed by the Richland County Council, two members appointed by the Lexington County Legislative Delegation, two members appointed by the Mayor and Council of the City of Columbia, and one ex officio member appointed by the Columbia Zoological Society.[46]

The appointments by the Richland County Council were attacked on the theory that the Commission's function was not a purpose in which a county may participate under Article X, Section 6, of the state constitution.[47] Such a constitutional attack was necessarily overruled by the court's holding that the financing of a zoo by a county was allowed by the constitutional provision.

The appointments by the Lexington County Legislative Delegation were attacked as violating the constitutional requirement of the separation of executive and legislative powers in government.[48] The court held that the statute "made the exercise of the appointive power a legislative function," and that there was thus no violation of the constitutional requirement.

The appointments by the Mayor and Council of the City of Col-

45. 181 S.E.2d at 673.

46. 56 S.C. STAT. AT LARGE 391, § 2 (1969).

47. S.C. CONST. art. X, § 6, reads in part as follows:

> The General Assembly shall not have power to authorize any county or township to levy a tax or issue bonds for any purpose except for educational purposes, to build and repair public roads, buildings and bridges, to maintain and support prisoners, pay jurors, County officers, and for litigation, quarantine and court expenses and for ordinary County purposes, to support paupers, and pay past indebtedness. . . .

48. S.C. CONST. art. I, § 14, reads as follows:

> In the government of this State the legislative, executive and judicial powers of the Government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

umbia were attacked on the theory that the inclusion of the City within the District was unconstitutional; the court's holding above disposed of the issue.

The plaintiffs' fatal blow to the legislation was their contention that the appointment by the Columbia Zoological Society (essentially a civic or service organization) constitutes an unlawful delegation of the legislature's appointive power, prohibited by Article III, Section 1, of the state constitution. On the authority of *Ashmore v. Greater Greenville Sewer District*[49] the court so held, and noted:

> The unconstitutional delegation of the appointive power to the zoological society renders the district without a legally constituted governing body and unable to function under the present legislation.[50]

Finally, the court held that the requirement that the annual budget be submitted to the Lexington County Legislative Delegation for its approval,[51] constitutes a violation of Article I, Section 14 of the state constitution, which requires a separation of the legislative, executive, and judicial powers of government, and also requires that no person or persons exercising the functions of one branch should assume or discharge the duties of another branch. The court held that the unconstitutional provision was severable from the remainder of the Act, and that its unconstitutionality did not affect the remainder.

III. EMINENT DOMAIN

In *Timmons v. South Carolina Tricentennial Commission*[52] the court held that the statute[53] granting the S.C. Tricentennial Commission the power of eminent domain, was not unconstitutional as special legislation; the court also concluded that the landowner was not denied due process and equal protection in the condemnation proceedings by which the Commission acquired her land.

The landowner first attacked the Act on the basis that it unconstitutionally excludes certain counties from its effect. However, the court

49. *See* n. 38, *supra.*
50. 181 S.E.2d at 674.
51. 56 S.C. STAT. AT LARGE 391, § 3 (1969).
52. 254 S.C. 378, 175 S.E.2d 805 (1970).
53. 49 S.C. STAT. AT LARGE 2194 (1956), as amended by 54 S.C. STAT. AT LARGE 2817 (1966); both hereinafter referred to as "the Act."

found no such exclusion in the procedure prescribed in the granting of the power of eminent domain to the Commission:

> The Joint Resolution merely prescribed the manner in which the power is to be exercised—that is, in accord with the general statutory procedure set out in Chapter 3, Title 25 of the Code. The language used is "in the manner prescribed. . . ."[54]

Secondly, on the authority of *Elliott v. Sligh*,[55] the landowner attacked the Act on the theory that it was unconstitutional as special legislation,[56] since in practice the Act applies only to one landowner, Timmons. After a survey of decisions interpreting the holding in *Elliot*, the court concluded:

> There are no limitations in the legislation which granted this power to [t]he . . . Commission. The fact [that] the funds have been appropriated for acquisition of lands only in Charleston, Richland and Greenville counties is not determinative of the issue. The General Assembly could have appropriated funds for projects in all 46 counties. *The grant of power* is in no way restricted. . . .
>
> The power being general in its terms and general in its application, this is not special legislation and does not smack of the evil at which the constitutional prohibition was aimed. As *Elliott* shows, the purpose of the provision is to prevent the legislature "in its wisdom" from creating 46 different county governments or penalizing some particular counties.[57]

Moreover, the court noted that the mere fact that legislation affects one person or one locale, does not make such legislation special legislation.[58]

Concerning the requirements of due process in such an acquisition, the court concluded that no particular procedure was required:

> The constitutional requirements are satisfied if the condemnee has

54. 254 S.C. at 397, 175 S.E.2d at 814-15.

55. 233 S.C. 161, 103 S.E.2d 923 (1958). In *Elliott* the court held:

> . . . The fact that legislation is expressed in general terms is not controlling. A law general in form, but special in its operation, violates a constitutional inhibition of special legislation as much as one special in form. The question must be decided not by the letter, but by the spirit and practical operation of the act.

Id. at 164, 103 S.E.2d at 426; *accord*, Town of Forest Acres v. Town of Forest Lake, 226 S.C. 349, 85 S.E.2d 192 (1959).

56. *See* S.C. CONST. art. III, § 34.

57. 254 S.C. at 399, 175 S.E.2d at 815 (emphasis added).

58. *Id.* at 399, 175 S.E.2d at 816. *See* Spitcaufsky v. Hatten, 353 Mo. 94, 182 S.W.2d at 86 (1944).

> (1) Reasonable notice, (2) Reasonable opportunity to be heard, . . . and (3) Reasonable compensation for the property taken. . . . If the trial accords the landowner the guarantee of adequate compensation under equitable rules, the requirements of due process are met. That will be done by the procedure prescribed for this taking.[59]

In *South Carolina State Ports Authority v. Kaiser*,[60] the Ports Authority had condemned Kaiser's land; the lower court denied her a jury trial in determining the amount of compensation. Kaiser appealed on the ground that a denial of a full hearing, with witnesses being examined and cross-examined, amounted to a denial of due process. The court held that when there was no showing in the record or in the appellant's brief as to precisely what facts she proposed to develop at such a hearing, there was no showing of prejudice and thus no violation of due process guarantees. The court pointed out that neither the statute under which the hearing was held,[61] nor due process generally, required any particular procedure for the reception of evidence.

IV. ELECTIONS

In *United Citizens Party v. South Carolina State Election Commission*,[62] a three-judge federal district court held that a statute, the effect of which was that a political party having a primary can control the date of the deadline for the submission of candidates by other parties having no primary, violates both due process and the right of the people peaceably to assemble and petition the government for the redress of their grievances, and violates the constitutional prohibition against the delegation of legislative power to private bodies.

After holding that the United Citizens Party of South Carolina is a properly certified party under the laws of the state,[63] the court faced two constitutional issues: first, does S.C. Code Section 23-264, in that

59. 254 S.C. at 395-96, 175 S.E.2d at 814.

60. 254 S.C. 600, 176 S.E.2d 532 (1970).

61. S.C. CODE ANN. § 25-101 *et seq.* (1962), entitled "Public Works Eminent Domain Law."

62. 319 F. Supp. 784 (D.S.C. 1970).

63. Due to the proximity of election day, the *United Citizens Party* case raised a host of intriguing issues, most of which are beyond the scope of this analysis; see *Jurisdictional Questions Involving Appeals of Injunctions and Declaratory Judgments Under 28 U.S.C. Section 1253, and the Problem of Mootness*, 23 S.C.L. REV. 276 (1971).

it grants to establish political parties the power to fix the deadline by which candidates for state office must be nominated and announced, violate the constitutional prohibition against the delegation of legislative power? Second, does the requirement of Section 23-264, that candidates entitled to a position on the ballot be nominated and announced seven months prior to the general election, discriminate against the United Citizens Party in violation of the first and fourteenth amendments to the federal constitution?

After an examination of the relevant statutes,[64] the court concluded:

> [A] political party having a primary can control the date of submission of candidates by parties having no primary by their control over the date of their state convention. . . .
>
> But the potential delegation problem is much greater. Consider what would happen if the Democratic Party broke with tradition and decided not to have a primary. . . . A party not having a primary can hold its state convention at any time after three weeks' notice. . . .
>
> Thus it is clear that the *sine qua non* of the plaintiff's failure to meet the statutory time limit for submitting the names of its candidates was the Democratic Party's decision not to break with tradition and to hold a primary in 1970.[65]

The court noted the general rule that "[A] legislature may not delegate legislative functions to private persons or associations,"[66] and interpreted South Carolina law on the subject to be that

> [L]egislative delegation to persons, groups or organizations unrelated to official government of power to nominate, appoint, or elect public officers is unconstitutional as an invalid delegation of legislative power and as a violation of equal protection of the laws and due process of law clauses of the state Constitution of South Carolina. . . . [subject to] a possible exception of a situation where the unofficial persons or bodies may be said to have a rational and substantial relation to the law to be administered.[67]

Finding no such exceptional situation, the court declared Code Section 23-264 unconstitutional, and granted appropriate relief to the plaintiffs.

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64. S.C. CODE ANN. § 23-262 (1962); S.C. CODE ANN. § 23-264 (1970 Supp.); S.C. CODE ANN. § 23-396 (1970 Supp.); S.C. CODE ANN. § 23-400.15 (1970 Supp.).

65. 319 F. Supp. at 788-89.

66. *See* 16 AM. JUR. 2d *Constitutional Law*, § 249 (1964).

67. 319 F. Supp. at 787-88; *see* Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88 (1947).

V. PUBLIC UTILITIES

In *Morgan v. Watts*[68] the court upheld the constitutionality of a statute which provides that all property, leased to and operated by the South Carolina Public Service Authority for the generation or transmission of electric power, should be considered the property of the Authority for tax purposes; the constitutional challenge was based upon the theory that the statute seeks to exempt privately owned property from taxation.

In 1969, the General Assembly enacted a statute[69] which removes the ad valorem tax exemption previously enjoyed by privately owned electric power cooperatives in South Carolina. The troublesome provision of the statute was Section 18, which provides that "[A]ll property leased to and operated by the . . . Authority for the generation or transmission of electric power shall, for all tax purposes, be considered the property of the Authority."[70] Coupled with Section 59-8,[71] which exempts property of the Authority from taxation, Section 18's effect was thus to exempt from taxation property owned by a private cooperative,[72] but leased to and operated by the Authority. The plaintiff attacked Section 18 as exempting privately owned property from taxation, in violation of Article X, Section 1, of the state constitution.[73]

The court noted first that the leased property in question was a vital and inseparable part of the Authority's entire system, and noted secondly its earlier holding that the generation and transmission of electric power by the Authority was a public and governmental function for the benefit of the people of South Carolina;[74] the court then concluded that Section 18's exemption of the leased property from taxation falls within the "municipal purposes" exception to the constitutional requirement of uniform and equal taxation.

68. 255 S.C. 212, 178 S.E.2d 147 (1970).

69. 56 S.C. STAT. AT LARGE 740 (1969).

70. 56 S.C. STAT. AT LARGE 740, § 18 (1969).

71. S.C. CODE ANN. § 59-8 (1962).

72. The Central Electric Power Cooperative, Inc., which in effect "[w]as merely the eligible conduit through which these [federal] funds were made available for the expansion of the Authority's electrical system at favorable interest rates." 255 S.C. at 215, 178 S.E.2d at 149.

73. S.C. CONST. art. X, § 1.

74. Clarke v. South Carolina Pub. Serv. Authority, 177 S.C. 427, 181 S.E. 481 (1935).

VI. SALARIES OF CONSTITUTIONAL OFFICERS

In *State ex rel. MacLeod v. Mills*,[75] the court held that the 1970 General Appropriations Act (which reduced the salaries of the state constitutional officers for fiscal year 1970) merely suspended, and did not repeal, the permanent statute which fixed the salaries of the officers; that, as of the end of fiscal year 1970, the officers were thus entitled to receive salaries at the level established in the permanent statute; and finally that such a result did not violate the constitutional prohibition against changing the officers' salaries during the term of office to which the officers have been elected.

During its 1969 session, the General Assembly enacted permanent provisions which established the salaries of the state constitutional officers.[76] During its 1970 session, the General Assembly enacted the General Appropriations Act[77] which provided for substantial reductions in the officers' salaries. Of particular importance is the following provision of the Appropriations Act: "All Acts or parts of Acts inconsistent with any of the provisions of Part I of this Act are hereby suspended for the fiscal year 1970-71."[78] Finding such language clear and unambiguous, the court held that the legislature intended to suspend temporarily, rather than repeal, the relevant portions of the permanent statute; therefore, as of July 1, 1971, the officers were entitled to receive salary increases to the extent provided in the permanent statute.

Having so held, the court was thus squarely presented with the question of whether such increases violate constitutional provisions that the compensation of the state constitutional officers shall not be changed during their terms of office.[79] The court held that there was no constitutional violation, because both the permanent statute and the suspending Appropriations Act were not *enacted* during the officers' terms of office. The court concluded, "[S]alaries may vary during the

75. 256 S.C. 21, 180 S.E.2d 638 (1971).

76. 56 S.C. STAT. AT LARGE 595, Part II, Permanent Provisions, § 15 (1969).

77. 56 S.C. STAT. AT LARGE 2085 (1970).

78. *Id.*

79. S.C. CONST. art. IV, § 13, provides "The Governor and Lieutenant Governor shall, at stated times, receive for their services compensation, which shall be neither increased nor diminished during the period for which they shall have been elected." S.C. CONST. art. IV, § 24, provides similarly for the compensation of the remaining constitutional officers.

term of office so long as they were fixed prior to the commencement of such term of office."

VII. CONSTITUTIONAL AMENDMENTS

In *Sadler v. Lyle*[80] the court held that a 1918 constitutional amendment exempting Rock Hill from a constitutional debt limit, was properly submitted to the electorate and approved, and was not invalid merely because the *one* question submitted exempted *both* Rock Hill and Florence from the debt limit.

The plaintiff brought an action to enjoin the issuance of all general obligation bonds by Rock Hill, which had been approved in a special election in 1969. In holding the election and in issuing the bonds, the City of Rock Hill had relied upon an amendment to the South Carolina Constitution,[81] submitted to the voters in the 1918 general election, which exempted Rock Hill and Florence from an 8% constitutional debt ceiling. The plaintiff contended that the 1918 amendment was not properly submitted to the people and approved, because it violated Article XVI, Section 2, of the South Carolina Constitution,[82] and was therefore not a valid part of the constitution.

The court examined the history of such amendments since 1895, and found a

> [L]egislative interpretation that the submission of a constitutional amendment relaxing the debt limit of several municipalities for several purposes by a single question does not violate the provisions of Article XVI, Section 2.[83]

The court found the legislative construction to be strongly persuasive, and concluded that the manner of submitting the 1918 amendment to the people was proper.

VIII. DIFFICULTY IN COMPLYING WITH STATUTE

In *State v. Life Insurance Co.*[84] the court held that the difficulty

80. 254 S.C. 535, 176 S.E.2d 290 (1970).

81. *Amending* S.C. CONST. art. VIII, § 7, and S.C. CONST. art. X, § 5.

82. S.C. CONST. art. XVI, § 2, provides, "If two or more amendments shall be submitted at the same time, they shall be submitted in such a manner that the elector shall vote for or against each of such amendments separately."

83. 254 S.C. at 543, 176 S.E.2d at 293.

84. 254 S.C. 286, 175 S.E.2d 203 (1970).

which might be experienced by insurers in complying with a fee-exemption statute,[85] in order to get the full benefit thereof, does not warrant judicial interference or relief.

The State brought an action to recover certain additional license fees as well as interest and penalties, allegedly due by the respondent life insurance company under S.C. Code Sections 37-122 and 37-124. The Commissioner calculated the amount of reduction in fees to which the respondent was entitled under Section 37-123, on the basis of the amounts of life insurance reserves invested in South Carolina on December 31st of each of the years involved; the respondent contended, and the lower court held, that the Commissioner should have calculated an *average* figure for each of the particular years. No particular mode of calculation was set forth in the statute. The respondent further contended that, since the statute's obvious object was to encourage foreign investment in South Carolina, and since the insurer gets the benefit of the statutory exemptions only during the time its investments are actually made and maintained in the state, it was "unrealistic, unfair, and inequitable" to look solely to the December 31st figure in calculating the insurer's invested reserves.

Agreeing that "[T]he use of December 31st as a reserve date might make it difficult for an insurer to get the full benefit of Sec. 37-123," the court nevertheless held:

> [T]he deduction and benefit is allowed as a matter of legislative grace. In order to take advantage of this statute the respondent was required to meet the conditions of the statute which granted the benefit.
>
> The legislature could have, if so minded, adopted an exemption more favorable to foreign insurers. On the other hand, it could have adopted none at all.[86]

IX. CIVIL ARREST

In *Carter v. Lynch*[87] the Fourth Circuit Court of Appeals held that

85. S.C. CODE ANN. § 37-122 (1962) imposes upon each foreign insurance company an additional and graded license fee of an amount equal to two percent of all premiums collected on life insurance policies in South Carolina. S.C. CODE ANN. § 37-124 (1962) provides the same for premiums collected on accident insurance policies. S.C. CODE ANN. § 37-123 (1962) provides for reductions in such fees, contingent upon the level of the insurance company's investments in South Carolina.

86. 254 S.C. at 294-5, 175 S.E.2d at 207; *accord*, Southern Soya Corp. v. Wasson, 252 S.C. 484, 167 S.E.2d 311 (1969).

87. 429 F.2d 154 (4th Cir. 1970).

the petitioner's civil arrest, in contempt for failure to pay a judgment against him for physical assault, did not violate the constitutional prohibition against imprisonment for debt, and that South Carolina's civil arrest and release statutes violate neither substantive nor procedural due process.

The court first pointed out that the civil arrest statute[88] is explicitly limited to actions "for the recovery of damages in a cause of action not arising out of contract," and then applied South Carolina law to the effect that causes of action arising *ex delicto* are not within the constitutional proscription.[89]

South Carolina's procedure for discharge from civil arrest[90] was attacked on two theories: that the procedure places an undue burden upon the petitioner of convincing the court that his sworn accounting is true; and that the procedure allows continued incarceration despite the absence of ordinary criminal processes, thus violating the requirements of due process. The court saw no constitutional difficulty in placing such a burden of proof upon the petitioner, since the applicant for a writ of habeas corpus carries the same burden.[91] The court considered the procedure required by statute to be "more than sufficient to ensure fairness in the critical exploration." Moreover, the procedure is properly a subject of legislation: "While undoubtedly harsh in implementation, the arrest and release sections . . . are well within the State's power to secure enforcement of the judgments of its courts."

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88. S.C. CODE ANN. § 10-802 (1962) reads as follows:

> Arrest in civil actions permitted in certain cases.—The defendant may be arrested, as prescribed in this article, in the following cases:
>
> . . . .
>
> (6) In an action for the recovery of damages in a cause of action not arising out of contract when the defendant is a non-resident of the State or is about to remove therefrom or when the action is for an injury to person or character or for injury to or wrongfully taking, detaining or converting property.

89. S.C. CONST. art. I, § 24 provides, "No person shall be imprisoned for debt except in cases of fraud." *See, e.g., Ex parte* Berry, 85 S.C. 243, 67 S.E. 225 (1910); *Ex parte* Hollman, 79 S.C. 9, 60 S.E. 19 (1908).

90. For his release a judgment debtor is required to make a full accounting of all his property, supported by an oath that he has made no transfers, either before or after suit was instituted, to defraud his creditors. An assignment of the listed properties must then be made. S.C. CODE ANN. §§ 10-844 to -846 (1962).

91. *See* Hall v. Warden, 313 F.2d 483, 487 (4th Cir. 1963), *cert. den. sub nom.* Pepersack v. Hall, 374 U.S. 809 (1963).

X. STATUTORY VAGUENESS AND OVERBREADTH

In *Abernathy v. Conroy*[92] the Fourth Circuit Court of Appeals upheld the constitutionality both of a Charleston parade ordinance and that of South Carolina's common-law definition of riot.

The plaintiffs were arrested in Charleston during a peaceful, *midnight* march from a church to a public park, where they were to conduct a protest prayer vigil with 250 of the their followers. The plaintiffs were charged with riot and parading without a permit. The plaintiffs had applied for and received permits for previous assemblies and processions in Charleston, but did not apply for one on this occasion because Section 31-195 of the Charleston City Code expressly prohibits the granting of a permit for a parade to terminate after 8 p.m.

On appeal, the plaintiffs first argued that Section 31-195 arbitrarily suspends the exercise of a citizen's first and fourteenth amendment rights at 8 p.m., in that it makes no provision for the needs of groups which must march after 8 p.m. The court noted:

> Peaceful picketing and parading are methods of expression entitled to first amendment protection, but they are methods subject to greater regulation than other forms of expression.[93]

The court further explained that the *form* that parading takes more often brings it into competition with "legitimate non-speech interests, which the state has a right to protect." The court concluded that the resolution of such conflicts "often means that the right to parade must yield to reasonable state regulation of time, place, manner, and duration." Thus the court balanced the inconvenience of forcing the marchers to assemble on weekends and in the late afternoons, against the interests of Charleston in so limiting parades; it found legitimate government interests in preserving serentity in the evenings for the mutual benefit of all citizens, in the decreased danger of violence in daytime parades, and in the increased ease with which such violent lawbreakers might be apprehended in a daytime parade, and thus upheld the constitutionality of Section 31-195.

The plaintiffs' second contention was that South Carolina's defi-

92. 429 F.2d 1170 (4th Cir. 1970).
93. 429 F.2d at 1173.

nition of riot[94] offends the first and fourteenth amendments because of vagueness and overbreadth. The court acknowledged that the vagueness argument involved the terms "tumultuous disturbance of the peace" and "terrific and violent manner." The court concluded:

> In our opinion these are not obscure terms. To the man on the street, we think "a tumultuous disturbance of the peace" clearly connotes noisy conduct . . . , and violence is a term with which twentieth century Americans are particularly well acquainted. . . . When the terms are seen in the context of the whole definition, they plainly suggest to the average citizen noisy, frightening conduct accompanied by harmful physical force.[95]

Concerning the overbreadth argument, the court set out the test: "A law is too broad under the Constitution when it sweeps within its ambit constitutionally protected behavior." After a survey of South Carolina decisions concerning common law riot convictions, the court concluded:

> [T]here can be no valid conviction for riot under South Carolina law without violence, . . . violent acts are not accorded protection under the first amendment, even though they also constitute expressive or communicative conduct.[96]

The court held that no balancing test was necessary, and that South Carolina might, consistently with the overbreadth doctrine, proscribe "violent activity that is also noisy and frightening."

In *State v. Burgin*[97] the court held that a South Carolina obscenity statute[98] was not unconstitutional as being vague or overly broad. The petitioner had been convicted under a provision which prohibits, *inter alia*, the sale or distribution of "obscene" matter.[99] Under the statute, "obscene" is defined thus:

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94. South Carolina's common law definition of riot is:
> [A] tumultuous disturbance of the peace, by three or more persons assembled together, of their own authority, with the intent mutually to assist each other against anyone who shall oppose them, and putting their design into execution in a terrific and violent manner, whether the object was lawful or not.

State v. Connolly, 3 Rich. 337, 338 (1832).

95. 429 F.2d at 1175.

96. *Id.* at 1176.

97. 255 S.C. 237, 178 S.E.2d 325 (1970).

98. S.C. CODE ANN. § 16-414.1 *et seq.* (1970 Supp.).

99. S.C. CODE ANN. § 16-414.2 (1970 Supp.) reads as follows:
> It shall be unlawful for any person knowingly to send or cause to be sent, to bring or cause to be brought into South Carolina for sale or distribu-

> "*Obscene*" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest among which is a shameful or morbid interest in nudity, sex or excretion, and which goes substantially beyond customary limits of candor in description or representation of such matters. . . .[100]

The court noted that the obscenity definition is intended to restate, and substantially does so restate, the test developed and approved in *Roth v. United States*.[101] Moreover, the South Carolina statute was considerably more detailed than the state and federal statutes upheld in *Roth*. On such grounds the court held that the South Carolina statute was neither vague nor overbroad.

In *Town of Honea Path v. Flynn*[102] the court held that an ordinance[103] making it unlawful to assault, resist, abuse or in any manner interfere with any employee of the town in the discharge of his duty, was unconstitutionally vague. The court found that Flynn's conviction under the ordinance "may well have rested upon nothing more than mere words uttered by the appellant which were not pleasing to the local police officers." The court's voiding of the ordinance as unconstitutionally vague centered upon the ordinance's failure to define the term "abuse":

> One's view as to what the term was intended to mean or connote would likely vary considerably, depending upon whether the viewpoint was that of the alleged abuser or that of the person allegedly abused.
>
> . . . .
>
> To allow . . . officers . . . the discretion to arrest and prosecute those whom they feel have made inappropriate remarks upon a charge of interference would . . . invite gross abuses of discretion and impose unfair penalties and burdens upon the citizenry.[104]

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tion, or to prepare, publish, print, exhibit, distribute or offer to distribute in the State, or have in his possession with intent to distribute, or to exhibit or offer to distribute, any obscene matter.

100. S.C. CODE ANN. § 16-414.1 (1970 Supp.).

101. 354 U.S. 476 (1957).

102. 255 S.C. 32, 176 S.E.2d 564 (1970).

103. Honea Path, S.C., Ordinance 102 provides, "It shall be unlawful for any person to assault, resist, abuse or in any manner, by word or act, interefere with a police officer or any other office or employee of the City in the discharge of his duty. . . ."

104. 255 S.C. at 40, 176 S.E.2d at 567.

XI. CRIMINAL PROCEDURE

In *Willis v. Leeke*[105] the court held that the transfer of the petitioner's indictment from a general sessions court, which utilized a jury of twelve, to a county court, which had concurrent jurisdiction over the offense charged but which used a jury of six, denied the petitioner neither due process nor equal protection.

The petitioner was indicted for assault and battery with intent to kill, by the grand jury at a term of the Greenville County Court of General Sessions; the indictment was then transferred to the Greenville County Court, which had concurrent jurisdiction of the offense,[106] as well as a smaller jury.[107] As was the general practice in the county, the clerk of court transferred the indictment at the direction of the circuit solicitor. The petitioner was convicted of the lesser offense of assault and battery of a high and aggravated nature and sentenced to a period of imprisonment; the instant appeal was from a lower court order denying the petitioner's application for post-conviction relief.

Rather than insist upon any constitutional right to a twelve-member jury,[108] the petitioner urged that the solicitor's exercise of his "unreviewable discretion" in determining which cases were to be transferred to the county court, deprived him of due process and equal protection. The court emphasized that the county court's concurrent jurisdiction was conferred by law and not by the actual transfer,[109] and then concluded:

> The mere fact that the clerk of court customarily relied upon the solicitor to designate the cases to be transferred to the county court deprived appellant of no constitutional right. Appellant's case was within the jurisdiction of the county court, which was the sole statutory criterion for transfer.[110]

XII. DISCIPLINARY PROCEEDINGS

In re Chipley[111] held that a disciplinary rule, which provides that

105. 255 S.C. 230, 178 S.E.2d 251 (1970).
106. S.C. CODE ANN. § 15-655 (1962).
107. S.C. CONST. art. V, § 22; *see also* S.C. CODE ANN. § 15-671 (1962).
108. The existence of any such right was denied in Williams v. Florida, 399 U.S. 78 (1970). *See also* State v. Cowart, 251 S.C. 360, 162 S.E.2d 535 (1965).
109. *See* State v. Douglas, 245 S.C. 83, 138 S.E.2d 845 (1964).
110. 255 S.C. at 236, 178 S.E.2d at 254.
111. 254 S.C. 588, 176 S.E.2d 412 (1970).

the practice of law by one affected by disqualifying emotional or mental instability amounts to constructive misconduct,[112] was not so vague and indefinite as to deprive the attorney of due process.

The Board of Commissioners on Grievances and Discipline recommended that the respondent be indefinitely suspended from the practice of law, on the ground of mental and emotional instability; the respondent contended that the rule, upon the authority of which the recommendation had been made,

> [I]s so vague and indefinite as to deprive the respondent of rights guaranteed him under the due process clauses of both the Constitution of the United States and the Constitution of the State of South Carolina.[113]

In rejecting the respondent's contention, the court said:

> The use of the phrase "in the judgment of ordinary men" simply signifies that in deciding whether disqualifying instability exists, the standards of the perfectionist . . . are to be avoided, and that of the man of ordinary tolerance for the imperfections of others is to be applied.[114]

XIII. RIGHTS OF MILITARY PERSONNEL

In *Dash v. Commanding General*[115] the Fourth Circuit Court of Appeals affirmed Judge Russell's decision,[116] which upheld the constitutionality of a Fort Jackson regulation prohibiting the distribution of printed material without the post commander's consent, and which sustained the commander's denial of the plaintiff's request for a public meeting on the post.

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112. S.C. CODE ANN. Rule on Disciplinary Procedure for Attorneys, § 4 (1970 Supp.), reads as follows:

> Misconduct, as the term is used herein, means any one or more of the following:
>
> . . . .
>
> (e) emotional or mental instability so uncertain, as in the judgment of ordinary men, would render a person incapable of exercising such judgment and discretion as necessary for the protection of the rights of others and/or their property or interest in property.

113. 254 S.C. at 591, 176 S.E.2d at 413.

114. *Id.* at 591-2, 176 S.E.2d at 413.

115. 429 F.2d 427, case 2 (4th Cir. 1970) (*mem*).

116. *See* Dash v. Commanding General, 307 F. Supp. 849 (D.S.C. 1969).