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South Carolina Constitutional Law

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SOUTH CAROLINA CONSTITUTIONAL LAW

I. PUBLIC EDUCATION

The State Education Assistance Act[1] designates the State Budget and Control Board the State Education Assistance Authority and authorizes that body to make, insure, or guarantee loans to students who are residents of South Carolina to defray their expenses for post-secondary education. Under the Act the Authority is empowered to issue bonds to raise funds for student loans. The bonds are retired solely from monies obtained from repayment of student loans or from direct federal grants and are not a debt against the credit of the state.[2] The constitutionality of the Act was upheld by a unanimous court in *Durham v. McLeod*.[3] The plaintiff, as a citizen and taxpayer, had challenged the Act on a multiplicity of state and federal constitutional grounds.

Plaintiff's first contention was that the Act served to support sectarian schools in violation of article XI, section 9 of the South Carolina Constitution.[4] In 1971 the court in *Hartness v. Patterson*[5] held that direct tuition grants appropriated from the general funds of the state for the purpose of aiding independent schools of higher learning were unconstitutional as tending to support religion. In *Durham* the court decided that this constitutional objection was overcome because all students may receive educational loans under the Act, whether the institution is public or private, sectarian or secular. Although the Act provides aid to

1. S.C. CODE ANN. §§ 22-96 to -96.17 (Cum. Supp. 1971), hereinafter referred to as "the Act."

2. *Id.* §§ 22-96.7, -96.15. All money received to the credit of the Authority is held in trust for the sole purpose of educational assistance loans. Students receiving assistance are authorized to attend public or private schools either in South Carolina or some other state.

3. 259 S.C. 409, 192 S.E.2d 202 (1972) (per curiam), *appeal docketed*, 41 U.S.L.W. 3456 (Jan. 24, 1973) (No. 72-1026).

4. S.C. CONST. art. XI, § 9, reads in part:

> The property or credit of the State . . . or [of any] other subdivision of the . . . 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, school . . . or other institution . . . which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society, or organization.

5. 255 S.C. 503, 179 S.E.2d 907 (1971).

higher education, that aid does not directly support any institution. More importantly, "[T]he student loan fund under the Act is held by the Authority as a trust fund, and . . . no public money or credit . . . is employed in making or guaranteeing loans."[6]

The plaintiff also averred that tuition loans under the Act violated the establishment clauses of both the State and Federal Constitutions.[7] The court, however, upheld the validity of the Act, reasoning that it met the tripartite test of *Lemon v. Kurtzman.*[8] In *Lemon* the United States Supreme Court held unconstitutional a Pennsylvania statute that authorized state salary supplements for teachers of secular subjects in non-public schools. Because of the continued state supervision and administrative intermeddling necessitated by the statute, the Supreme Court held it unconstitutional on the facts. The Court enunciated three tests: First, the statute must have a secular legislative purpose;[9] second, the primary effect of the statute must be one that neither advances nor inhibits religion; and third, the statute must not foster an excessive governmental entanglement with religion.[10]

In *Durham* the plaintiff conceded that the purpose of the Act was secular and that the Act did not foster excessive entanglement between government and religion. Because it focused on the student-recipient rather than the institution, the Act also met the final test by not promoting or inhibiting religion. In the court's opinion the Act is "scrupulously neutral as between religion and irreligion and as between religions. It simply aids and encourages South Carolina residents in pursuit of higher education, and leaves all eligible institutions free to compete for their attendance and dollars."[11]

It is interesting to note that the court did not mention *Hunt v. McNair.*[12] In a comprehensive opinion in *Hunt*, the court advanced the same rationale adopted in *Durham* to uphold, against establishment clause objections, state revenue bond financing for

6. 259 S.C. at 413, 192 S.E.2d at 204.

7. U.S. CONST. amend. I; S.C. CONST. art. I, § 4.

8. 403 U.S. 602 (1971).

9. *Id.* at 612. *See also* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963).

10. 403 U.S. at 614; *see also* Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970).

11. 259 S.C. at 413, 192 S.E.2d at 204.

12. 258 S.C. 97, 187 S.E.2d 645, *prob. jur. noted*, 93 S. Ct. 223 (1972) (No. 71-1523), *noted in* 24 S.C.L. REV. 634, 643 (1972).

private colleges under the Educational Facilities Authority Act.[13] *Hunt* is currently awaiting decision on appeal to the United States Supreme Court.

In *Moore v. Board of Trustees of Charleston County Consolidated School District,*[14] the Federal District Court for the District of South Carolina considered the ramifications of tuition-supported, voluntary summer school programs conducted in public secondary educational facilities. The indigent plaintiff, mother of two sons who had failed courses in which they were enrolled during the regular school term, brought a class action contesting the validity of tuition-supported summer school programs. The court, in dismissing the complaint and denying the plaintiff's motion to restrain the collection of tuition fees, noted that no statutory authority exists for the maintenance of summer school programs. Those programs are not a part of the regular school year and are not funded by either state or local school district taxes. Teachers are paid exclusively from funds generated by the tuition charged. The extent of state support is therefore limited to providing school facilities and janitorial services.[15]

There is no constitutional provision specifically requiring free schools in South Carolina or the nation.[16] Education is thus not a fundamental right guaranteed to all citizens, but is rather in the nature of a substantive right implicit in the liberty assured by the due process clause.[17] Where resources are finite—and this was conceded by the plaintiff—the action of the state need only be rationally based and free from invidious discrimination.[18] Noting that tuition fees for summer school were assessed in order that

13. S.C. CODE ANN. §§ 22-41 to -41.17 (Cum. Supp. 1971).

14. 344 F. Supp. 682 (D.S.C. 1972).

15. By emphasizing these facts the court insouciantly implied, without so holding, that there was insufficient state action upon which to base an equal protection argument; *see* 344 F. Supp. at 687.

16. *Id.* at 684.

17. *Id.* at 687; *cf.* San Antonio Independent School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973), in which the Supreme Court recently stated:

> Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard of reviewing a State's social and economic legislation. *Id.* at 1297-98.

18. *See* Dandridge v. Williams, 397 U.S. 471 (1970), in which the Court held that a state-imposed ceiling of $250 per family, regardless of family size, for Federal Aid to Families with Dependent Children was rational and permissible because the ceiling was dictated by finite welfare resources.

the program could be offered, the court held that tuition-supported and voluntary summer school programs are not violative of equal protection.[19]

In *Bruce v. South Carolina High School League,*[20] the court held that a rule of the defendant league prohibiting interscholastic athletic competition for one year by students who voluntarily transfer between schools does not violate the equal protection clause. The league is an organization of all public high schools and some private schools in South Carolina. It has ruled that if a student voluntarily transfers from one high school to another without a bona fide change in residence he is ineligible to compete in interscholastic athletics for one year.[21] Prior to the 1971-72 school year the plaintiff voluntarily transferred to a member school and was thereupon declared ineligible to compete. Plaintiff, through his guardian ad litem, contended that interscholastic athletics are a fundamental segment of the public education process and that he was deprived of equal protection by the application of the league's rule. The trial court restrained enforcement of the rule.

The South Carolina Supreme Court, however, rejected the contention that high school athletics are a fundamental part of public education.[22] Instead, the court determined that athletics are governed by the discretionary standards set by the schools themselves and that student participation may be limited under these standards. Treating the league as essentially a voluntary organization, the court refused to interfere with its internal affairs because the league's decision was not patently the result of mistake, fraud, illegality, collusion, or arbitrariness. The league applied its rule evenly to all voluntary transfers.[22.1] Thus, because there is no constitutionally protected right to participate in inter-

19. 344 F. Supp. at 687; *See generally* McLamore v. State, 257 S.C. 413, 186 S.E.2d 250 (*inter alia*, state has no duty to educate prisoner), *cert. denied mem.*, 93 S. Ct. 240 (1972).

20. 258 S.C. 546, 189 S.E.2d 817 (1972).

21. The purpose of the rule is to prevent inter-school "raiding" of high school athletes. If the transfer is made voluntarily by the student without a bona fide change of residence, the motive for the transfer is immaterial. 258 S.C. at 550, 189 S.E.2d at 818.

22. *Id.* at 551, 189 S.E.2d at 819; *see* Starkey v. Board of Educ., 14 Utah 2d 227, 381 P.2d 718 (1963); State *ex rel.* Ind. High School Athletic Ass'n, v. Lawrence Cir. Ct., 240 Ind. 114, 162 N.E.2d 250 (1959).

22.1 The court noted that when transfers result from court orders the league permits the students to participate. 258 S.C. at 553, 189 S.E.2d at 819. Those transfers, of course, are not necessarily voluntary. No other exceptions apparently are made.

scholastic athletics, the court found no violation of equal protection.

II. BOND FINANCING

In *Harper v. Schooler*[23] the court considered the validity of the bond act[24] designed to implement the Pollution Control Act.[25] In order to conform to the requirements of the Act, International Paper Company found it necessary to construct extensive water pollution control facilities. In accordance with the provisions of the bond act, the Board of Commissioners of Georgetown County and International Paper entered into a loan agreement whereby the county authorized the issuance of $3,000,000 of revenue bonds to fund the construction of the required facilities. International Paper was unconditionally required to repay the loan. After full repayment title to the facilities would vest in the corporation upon payment of one dollar to the county.

Plaintiff's first contention was that the bonds represented a bonded obligation within the meaning of article VIII, section 7 of the South Carolina Constitution.[26] The court found this contention to be without merit, because under the terms of the bond act and the loan agreement the bonds were repayable solely from monies due under the loan agreement with International Paper. In the court's view, the bonds and interest coupons did not constitute a monetary liability of the governmental unit or a charge on its general credit or taxing power.[27] The court noted that in *Elliott v. McNair*[28] it had held that the Industrial Revenue Bond Act,[29] which has similar provisions, does not violate article VIII, section 7, and is a valid exercise of legislative power. Bond issues in both situations are limited obligations and do not offend the constitutional restrictions of bonded indebtedness.[30]

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23. 258 S.C. 486, 189 S.E.2d 284 (1972).

24. S.C. CODE ANN. §§ 63-195.51 to -195.65 (Cum. Supp. 1971).

25. *Id.* §§ 63-195 to -195.36.

26. S.C. CONST. art. VIII, §7, prohibits bonded indebtedness of cities or towns from exceeding eight percent of the assessed value of the total taxable property therein and requires a referendum for any such bond issues.

27. 258 S.C. at 492-93, 189 S.E.2d at 287-88; *see* S.C. CODE ANN. § 63-195.53 (Cum. Supp. 1971).

28. 250 S.C. 75, 156 S.E.2d 421 (1967).

29. S.C. CODE ANN. §§ 14-399.21 to -399.35 (Cum. Supp. 1971).

30. The plaintiff also asserted that the bond arrangement violated virtually every conceivable stricture of the South Carolina Constitution including S.C. CONST. art. I, § 5;

The court also decided that the contract provision vesting title in the corporation upon termination of the loan agreement did not violate the state constitutional prohibition of donating public lands to private corporations. When under the terms of the agreement benefits inure, or may be expected to inure, to the state or the public, the constitutional prohibition does not apply.[31] The court found a public purpose and benefit even though International Paper was required by the Pollution Control Act to construct the facilities. Utilization of the bonds would induce the corporation to remain in the county and would also abate water pollution.

Plaintiff's third contention was that the delegation to the State Budget and Control Board of the authority to approve proposed facilities[32] was a devolution of executive duties to members of the General Assembly and thus violated the doctrine of separation of powers.[33] The court held that there was no impermissible delegation because the bond act was reasonably complete in itself when it left the General Assembly, and thus the approval of facilities was a mere ministerial act not violative of the separation of powers doctrine.[34]

Finally, the court decided that the twenty-day statute of limitations set by the bond act for contesting the issuance of revenue bonds was not so short as to deny the plaintiff equal protection and due process.[35]

III. COUNTY AND MUNICIPAL AFFAIRS

In a per curiam decision the supreme court adopted the opinion of Circuit Judge Ness in *Morris v. Scott*[36] and upheld the validity of legislation enabling Aiken County to relocate its courthouse. In 1968 the General Assembly authorized the County

art. III, §§ 13, 31; art. X, §§ 5,6. The court disposed of these arguments by noting tersely (and, with respect to some, inappropriately) that "revenue bonds . . . are not 'bonded' debt within the meaning of any provision of the South Carolina Constitution." 258 S.C. at 295, 189 S.E.2d at 288.

31. 250 S.C. at 89-90, 156 S.E.2d at 428; State v. Broad River Power Co., 177 S.C. 240, 181 S.E. 41 (1935).

32. S.C. CODE ANN. § 63-195.63 (Cum. Supp. 1971).

33. S.C. CONST. art. I, § 8.

34. 258 S.C. at 499, 189 S.E.2d at 290; *See also* DeLoach v. Scheper, 188 S.C. 21,198 S.E. 409 (1938); *But cf.* Gunter v. Blanton, 259 S.C. 473, 192 S.E.2d 473 (1972), note 48 *infra* and accompanying text.

35. S.C. CONST. art. I, § 3.

36. 258 S.C. 435, 189 S.E.2d 28 (1972).

Board of Aiken County to issue general obligation bonds to construct a new courthouse.[37] A constitutional amendment, approved by the electorate in 1968, increased the county's bonded indebtedness to an amount not to exceed fifteen percent of the assessed value of the total taxable property in the county.[38] In 1970 the General Assembly authorized the county to relocate the courthouse within the city limits of the county seat.[39] Plaintiff contended that this act was special legislation within the meaning of article III, section 34 of the South Carolina Constitution[40] and, alternatively, that section 14-2 of the Code required a referendum before the courthouse could be moved.[41]

The court held that section 14-2 does not necessitate a countywide referendum if the proposed relocation is within the corporate limits of the present county seat.[42] The purpose underlying this section is to provide for referenda when new counties are formed or when county seats of existing counties are transferred to another municipality within the county. The General Assembly, said the court, still retains the power to provide for the relocation of a courthouse within the limits of an existing county seat, there being no constitutional limitation in this regard.[43]

The claim that Act No. 1319 of 1970 was unconstitutional special legislation was also without merit. The 1968 legislation authorizing the bond issue was impliedly ratified by constitutional amendment,[44] and this legislation was sufficient in itself to authorize the removal of the courthouse. For all practical purposes the 1970 legislation was superfluous. Furthermore, the prohibition of special legislation[45] is not applicable when legislation relates to the fiscal affairs of a county or deals with local county government.[46] The language of the constitutional provision

37. No. 1426, [1968] S.C. Acts & Jt. Res. 3247.

38. S.C. CONST. art. X, § 5(137). The amendment does not refer to the removal of the Aiken County courthouse.

39. No. 1319, [1970] S.C. Acts & Jt. Res. 2782.

40. S.C. CONST. art. III, § 34.

41. S.C. CODE ANN. § 14-2 (1962).

42. S.C. CONST. art. VII, § 8, reads in part as follows: "No County seat shall be removed except by a vote of two-thirds of the qualified electors of said County voting in an election held for that purpose . . . ."

43. 258 S.C. at 440, 189 S.E.2d at 30.

44. S.C. CONST. art. X, § 5(137).

45. S.C. CONST. art. III, § 34. Item IX thereunder prohibits special legislation where a general statute can be made applicable.

46. *See, e.g.*, Knight v. Hollings, 242 S.C. 1, 129 S.E.2d 746 (1963).

clearly implies that in many instances the exigencies of the situation require a special statute.[47] Thus the court held that the legislation authorizing the relocation of the courthouse was not special legislation within the meaning of the constitutional prohibition.

In *Gunter v. Blanton*[48] a divided court held unconstitutional a statute giving the Cherokee County legislative delegation the authority to approve or disapprove of any school tax increase adopted by the Board of Trustees. In 1967 the General Assembly consolidated the county Board of Trustees, establishing it as the governing body of the county schools, with the power to determine the tax levy needed to operate the schools for each year.[49] In 1969 the General Assembly amended the statute, with the approval of county voters, to require that a majority of the resident members of the county legislative delegation consent to any increase in school taxes.[50] Four members of the court said that the effect of the 1969 amendment was to ordain the resident legislative delegation as a committee of the General Assembly which could not only determine when a tax increase was proper, but could also take whatever action it deemed proper. It is clear that the General Assembly may properly delegate the power to tax[51] and to impose a millage ceiling. Nevertheless, the court held that the statute also permitted members of the General Assembly to sit as members of the Board of Trustees, thus assigning them an executive role in violation of the doctrine of separation of powers.[52]

Justice Bussey, dissenting, considered the delegation constitutionally permissible[53] and the imposition of taxes by the delega-

47. Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939); *See generally* Doran v. Robertson, 203 S.C. 434, 27 S.E.2d 714 (1943); Law v. City of Spartanburg, 148 S.C. 229, 146 S.E. 12 (1928) (statute providing for constructin of county hospital on site to be determined by the hospital board of trustees was not invalid special legislation).

48. 259 S.C. 436, 192 S.E.2d 473 (1972). *See also* Survey of Taxation *infra*.

49. No. 685, [1967] S.C. Acts & Jt. Res. 1383 (codified at S.C. CODE ANN. § 21-1718 (Cum. Supp. 1971), *as amended*).

50. No. 542, [1969] S.C. Acts & Jt. Res. 922 (codified at S.C. CODE ANN. § 21-1718 (Cum. Supp. 1971)). This statute states in part: "[N]o such tax levy shall be increased in any year without the approval of a majority of the resident members of the Cherokee County Legislative Delegation."

51. S.C. CONST. art. X, §§ 3, 5.

52. S.C. CONST. art. I, § 8; *see* Gould v. Barton, 256 S.C. 175, 181 S.E.2d 662 (1971) (Lexington County legislative delegation's power to approve budget held unconstitutional); *But see* Harper v. Schooler, 258 S.C. 486, 189 S.E.2d 284 (1972), note 23 *supra* and accompanying text.

53. *See* Stackhouse v. Floyd, 248 S.C. 183, 149 S.E.2d 437 (1966).

tion merely a ministerial act by an arm of the General Assembly.[54] Historically, the practice of permitting legislative delegations to share in the governmental process in their respective counties has been widespread.[55] Whether the court has permitted this practice has depended primarily upon the extent of legislative involvement in local executive decisions.[56]

IV. POWER TO TAX

In *United States Steel Corp. v. South Carolina Tax Commission*,[57] the court held there was no violation of the commerce clause when the taxpayer, whose primary source of income in the state was derived from sales, was denied the right to elect a tax option designed to apply to foreign corporations whose primary business in the state was manufacturing.[58] Under South Carolina law the income of every foreign corporation is allocated to factors related to its business involvement in the state.[59] If a taxpayer's principal business in the state is either manufacturing or sales, the total attributed taxable income is the average of the following ratios:[60] (1) taxpayer's property in the state to his total property, (2) taxpayer's payroll in the state to his total payroll, and (3) taxpayer's sales in the state to his total sales.[61] Prior to 1971,[62] South Carolina permitted a foreign corporation whose primary business in the state was manufacturing to eliminate the sales factor, while a corporation primarily engaged in sales could eliminate the payroll factor and compute its net taxable income using only the property and sales factors.[63]

54. *See* Doran v. Robertson, 203 S.C. 434, 27 S.E.2d 714 (1943); Southern Ry. v. Kay, 62 S.C. 28, 39 S.E. 785 (1901).

55. *See, e.g.*, S.C. CODE ANN. § 21-920.1 (Cum. Supp. 1971) (legislative delegation fixes tax levy in each school district in Greenwood County).

56. *See, e.g.*, Harper v. Schooler, 258 S.C. 486, 189 S.E.2d 284 (1972); Gould v. Barton, 256 S.C. 175, 181 S.E.2d 662 (1971).

57. 259 S.C. 153, 191 S.E.2d 9 (1972).

58. S.C. CODE ANN. § 65-222 (Cum. Supp. 1971) reads in part: "[E]very foreign corporation . . . doing business, or having an income within the jurisdiction of this State . . . shall pay annually an income tax equivalent to six percent of a proportion of its entire net income, to be determined as provided in this chapter."

59. *Id.* § 65-279 *et seq.* (1962), *as amended.*

60. *Id.* § 65-279.3. *See generally* Hertz Corp. v. South Carolina Tax Comm'n, 246 S.C. 92, 142 S.E.2d 445 (1965).

61. S.C. CODE ANN. §§ 65-279.4 to -279.6 (1962), hereinafter referred to as the "property factor," the "payroll factor," and the "sales factor," respectively.

62. No. 410, [1971] S.C. Acts & Jt. Res. 730, effective January 1, 1971.

63. No. 50, [1958] S.C. Acts & Jt. Res. 1574.

The plaintiff-taxpayer, contending it was a manufacturer, tried to claim the manufacturer's alternative for computing taxable income. Its claim was disallowed by the Tax Commission, and after paying the tax under protest it filed suit for recovery of the deficiency. The court first disallowed taxpayer's claim that it was a manufacturer and not a seller because 95 per cent of its income in South Carolina was derived from sales of steel products. For tax purposes the technical situs of a sale is irrelevant; if property receives benefits or protection from the state, it will have a tax situs within the state.[64]

The taxpayer further contended that denying it the use of the manufacturer's alternative impermissibly discriminated against interstate commerce.[65] The court, following *Northwestern States Portland Cement Co. v. Minnesota,*[66] rejected this contention because a state may properly tax a portion of the net income of an interstate business, as long as the portion taxed is reasonably attributable to income derived within the state, and the tax is nondiscriminatory.[67]

In response to the taxpayer's claim that he was subjected to double taxation because part of the sales factor used by South Carolina was also computed in the tax formula of Alabama, the state of origin, the court said, "The fact that the amount of a given sale has been figured in the apportionment formulas of two states is insufficient, standing alone, to show impermissible double taxation."[68]

V. CLAIM AND DELIVERY LAW

In *Fuentes v. Shevin*[69] the United States Supreme Court held that claim and delivery statutes in Florida and Pennsylvania violated due process by permitting seizure of property without a hearing. The Florida statute, allowing a secured party to obtain a prejudgment writ of replevin by *ex parte* application upon posting a bond for double the value of the property to be seized, was

64. 259 S.C. 153, 191 S.E.2d 9; *see* Braniff Airways, Inc. v. Nebraska State Bd. of Equalization & Assessment, 347 U.S. 590 (1954).

65. U.S. CONST. art. I, § 8.

66. 358 U.S. 450 (1959).

67. *Id.* at 462; *But cf.* Norfolk & W. Ry. v. Missouri Tax Comm'n, 390 U.S. 317 (1968) (a totally unrealistic apportionment violates both the due process and commerce clauses).

68. 259 S.C. at 160-61, 191 S.E.2d at 12; *see* 15 U.S.C. §§ 381-384 (1970).

69. 407 U.S. 67 (1972). *See* Survey of Legislation *supra.*

similar to the procedure then authorized in this state.[70] In *Hammond v. Powell*[71] plaintiff's household furniture was repossessed by the sheriff in accordance with the existing claim and delivery law. Plaintiff was unable to post the required bond of double the value of the goods seized pending the post-seizure hearing. She thereupon filed a class action in federal district court alleging, *inter alia,* a violation of due process by seizure of her property without notice or hearing. After her complaint was filed but before it was heard, a state court rendered final judgment and awarded title to the seized goods to the secured party. The district court dismissed plaintiff's class action as moot. She appealed to the Fourth Circuit Court of Appeals, which reversed on the grounds that the controversy was not mooted by the final judgment of the state court. The court of appeals reasoned that when the complaint was filed the controversy was not moot and that, due to poverty, the plaintiff and members of her class might thereafter be subjected to similar actions under the claim and delivery statute. Because of the substantial public interest in the case, the court remanded for a hearing on the merits.[72]

Subsequent to the *Hammond* decision *Fuentes* was announced. In response to that decision, the General Assembly amended the claim and delivery statute to provide for notice and the right to a pre-seizure hearing.[73] The party in possession, however, may waive his right to the hearing.[74] Moreover, if the secured party makes a showing that the collateral is probably in immediate danger of being destroyed or concealed, the magistrate can authorize immediate seizure prior to a hearing.[75] Although

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70. S.C. CODE ANN. §§ 10-2501 to -2516 (1962), *as amended,* S.C. CODE ANN. §§ 10-2504, -2505, -2507 to -2507.5 (Supp. 1972).

71. 462 F.2d 1053 (4th Cir. 1972).

72. *Cf.* United States v. W. T. Grant Co., 345 U.S. 629 (1953); Washington v. Lee, 263 F. Supp. 327 (W.D. Ala. 1966), *aff'd,* 390 U.S. 333 (1968).

73. S.C. CODE ANN. § 10-2504 (Supp. 1972) reads in part:

> The plaintiff shall attach to the affidavit a notice of the right to a preseizure hearing which shall notify the defendant that within five days from service thereof, he may demand such hearing by notifying the clerk of court in writing and present such evidence touching upon the probable validity of the plaintiff's claim for immediate possession, and defendant's right to continue in possession.

74. *Id.* § 10-2507.2 reads in part: "No property shall be seized . . . unless five days' notice and an opportunity to be heard have been afforded the party in possession . . . ." The debtor, however, may waive the right to a pre-seizure hearing if the waiver is conspicuously displayed in the contract and includes the words "waiver of hearing prior to immediate possession."

75. *Id.* § 10-2507.4.

the amended procedure has not been challenged, the waiver of pre-seizure hearing may not pass constitutional muster in light of the *Fuentes* opinion.[76]

VI. LIQUOR REGULATION

The constitutionality of the "brown bagging" law was upheld in *Winter v. Pratt*,[77] in which the appellant licensee made a sweeping attack on the constitutional implications of the South Carolina liquor statutes. In *Winter* the licensee's permit was suspended by the Alcoholic Beverage Control Commission because of unauthorized sales of liquor to customers. The licensee attempted to employ the subterfuge that his sale of "set ups" and purported gift of house liquor did not constitute a sale of liquor prohibited by the statutes, but this contention was dismissed by the court.[78]

Under the Constitution the General Assembly has the authority to regulate and license the sale of alcoholic beverages.[79] Pursuant to the provisions of the then applicable "brown bagging" law, customers were permitted to consume their own liquor on the premises of a properly licensed business establishment.[80] The licensee, who operated a Columbia nightclub, was cited for violating the liquor statutes by selling mixed drinks to his patrons. The court said that Code section 4-31,[81] requiring a retailer to be licensed, section 4-91,[82] making the sale of liquor without a

76. *But cf.* Greene v. First Nat'l Exch. Bank, 348 F. Supp. 672 (W.D. Va. 1972). In this post-*Fuentes* opinion, the district court said the use of self-help by a secured party to repossess property sold under an installment sales contract was valid under Virginia law, which allows the secured party to take possession of the collateral without judicial intervention if it can be done without a breach of the peace. *Compare* Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972), *with* Adams v. Egley, 328 F. Supp. 614 (S.D. Cal. 1972). *See* Survey of Legislation *supra*.

77. 258 S.C. 397, 189 S.E.2d 7, *appeal dismissed mem.*, 93 S. Ct. 430 (1972). *See* Survey of Administrative Law *and* Survey of Criminal Law and Procedure *supra*.

78. *See* Pirates' Cove, Inc. v. Strom, 249 S.C. 270, 153 S.E.2d 900 (1967). In that case the same licensee involved in *Winter* contended that his transaction was a gift rather than an illegal sale of liquor. The court said that a sale without a license is unlawful regardless of the form of the transaction. *See also* Survey of Criminal Law and Procedure *supra*.

79. S.C. CONST. art. VIII, § 11.

80. No. 398, § 10, [1967] S.C. Acts § Jt. Res. 571 (codified at S.C. CODE ANN. § 4-29 (Cum. Supp. 1971)). This section has of course been amended by the "mini-bottle" law, No. 1063, [1972] S.C. Acts & Jt. Res. 2213, which was implemented by ratification at No. 122, [1973] S.C. Acts & Jt. Res. 146.

81. S.C. CODE ANN. § 4-31 (1962).

82. *Id.* § 4-91.

license unlawful, and article VIII, section 11 of the South Carolina Constitution,[83] which at that time prohibited the granting of a license to sell liquor in quantities of less than one-half pint, when read together, clearly warned the licensee that his sale of liquor by the drink was unlawful. Thus the court held that the statutory scheme for controlling liquor was sufficiently definite to be constitutional.

The licensee contended that the liquor statutes, permitting sales in quantities of one-half pint or more but prohibiting a subsequent sale of liquor by the drink, were arbitrary, facilitated excessive consumption, and thus violated due process. The court rejected this contention, stating that the scope and extent of legislation, if otherwise constitutionally permissible, depend upon the judgment of the legislature.[84] If the purpose of a statute is based upon the state's police power, the court will presume the propriety of the statute.[85] Furthermore, there must be some rational relationship between the purpose of the statute and the means chosen by the legislature to effect it. The *Winter* court found a valid constitutional purpose in the regulation of liquor and, by refusing to inquire into legislative motives, implicitly recognized a rational relationship between that purpose and the statutory scheme implementing it.

The court also found no impermissible burden on interstate commerce created by the statutes regulating sales of liquor. The twenty-first amendment reserves broad rights to the states to regulate intoxicating liquors.[86] It is clear that regulation that might otherwise be prohibited under the commerce clause is permissible when the commodity regulated is intoxicating liquor.

VII. OBSCENITY

In *State v. Watkins*[87] the court upheld the obscenity convic-

83. S.C. CONST. art. VIII, § 11.

84. 258 S.C. at 405, 189 S.E.2d at 10.

85. Breard v. Alexandria, 341 U.S. 622 (1951); *See also* Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination law was related to the police power to protect public health).

86. U.S. CONST. amend. XXI, § 2, reads as follows: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." *See* Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939).

87. 259 S.C. 185, 191 S.E.2d 135 (1972), *petition for cert. filed,* 41 U.S.L.W. 3364 (U.S. Nov. 2, 1972) (No. 72-683).

tion of a motion picture theater operator but declared a severable portion of the criminal obscenity statute unconstitutional.[88] The defendant was indicted for exhibiting the motion picture "Anomalies" and was convicted by the uncontradicted testimony of two witnesses that the picture showed a shameful or morbid interest in sex going beyond customary limits of candor.[89] A unanimous court said that whether allegedly obscene matter exceeds community standards of candor is a question of fact to be decided by the jury, subject to the scrutiny of the court.[90]

The test of obscenity was established in *Roth v. United States*[91] and has been expanded in subsequent decisions. The *Roth* test requires three separate elements: (1) The dominant theme of the material taken as a whole must appeal to a prurient interest in sex; (2) the material must be patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (3) the material must be utterly without redeeming social value.[92] The test contemplates a national rather than a local or statewide standard for obscenity.[93] Perhaps in the final analysis the jury becomes the arbiter of that standard. The *Watkins* court said that the motion picture, which was exhibited to the jury, was sufficient in itself to permit a determination of obscenity.[94] The court based its decision on the dubious premise that the South Carolina statutory test for obscenity is more stringent than the federal

88. S.C. CODE ANN. §§ 16-414.1 to -414.9 (Cum. Supp. 1971), *amending* S.C. CODE ANN. § 16-414 (1962).

89. Both witnesses for the State were local merchants who had engaged in business in the community for thirty-two and fifty years, respectively. There was no showing by the State that either was aware of what national community standards were. Record at 13, 32.

90. Obscenity is defined by S.C. CODE ANN. § 16-414.1(a) (Cum. Supp. 1971) as follows:

> "*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, which goes substantially beyond customary limits of candor in description or representation of such matters . . . .

91. 354 U.S. 476 (1957).

92. *See* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966); Mishkin v. New York, 383 U.S. 502 (1966).

93. Jacobellis v. Ohio, 378 U.S. 184 (1964).

94. *See generally* Ginzburg v. United States, 383 U.S. 463 (1966); *But cf.* Jacobellis v. Ohio, 378 U.S. 184 (1964).

standard.* Under the federal test the material must be patently offensive; the state test requires that it go substantially beyond the customary limits of candor.[95]

The court, however, did hold unconstitutional a portion of the obscenity statute that exempted from its terms those motion pictures approved by the Motion Picture Association of America.[96] The power to legislate cannot be delegated to private persons or corporations. Thus, since the offensive statutory section neither clearly established a legislative policy nor set standards for the execution of that policy, it offended procedural due process and was held invalid.[97] Because the section was severable, the conviction of the defendant, based on another section of the obscenity statute, was allowed to stand.

OSCAR LEE STURKEY

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* [*Editor's Note*: After this issue had gone to press, the United States Supreme Court promulgated its controversial new test for determining what is obscene and thus not protected by the first amendment. Miller v. California, 41 U.S.L.W. 4925 (U.S. June 21, 1973) (5-4 decision). If sexual material is "patently offensive," appeals to prurient interest, and depicts conduct specifically defined by statute, it "can be regulated by the States . . . without a showing that [it] is '*utterly* without redeeming social value' . . . ." *Id.* at 4931. To be considered obscene such material need only lack "*serious* literary, artistic, political, or scientific value." *Id.* at 4928 (emphasis added). Moreover, the test is no longer based upon an illusory hypothecation of "national standards" but is intended to be an outgrowth of "contemporary community standards" as that term is commonly (but not legally) understood. *Id.* at 4929-30. The "community" envisioned by the Court is apparently coextensive with the venire district from which the jury is selected.

It is difficult to predict the impact of this decision, if any, on the *Watkins* case, which arguably was wrongly decided under the former test and is now on certiorari to the Supreme Court. *Miller* unquestionably restricts the reach of first amendment protection and thus, in the opinion of the writer, should not be retroactively applied. Nevertheless, because the Court explained the new test as a clarification of existing law and a reaffirmation of *Roth*, it could vacate and remand *Watkins* for rephrasing consistent with that test. Further confounding prediction is the fact that the *Miller* approach appears to be every bit as vague as the test that it supplanted.]

95. 259 S.C. 185, 191 S.E.2d 135; *see* Mishkin v. New York, 383 U.S. 502 (1966) (state definition of obscenity as "hard core pornography" was more stringent than the federal standard and thus was permissible); *But cf.* Shinall v. Worrell, 319 F. Supp. 485 (E.D.N.C. 1970) (statute invalid for failing to pass constitutional muster on definition of obscenity).

96. S.C. CODE ANN. § 16-414.9 (Cum. Supp. 1971).

97. S.C. CONST. art. I, § 3.