South Carolina Law Review

Volume 32 | Issue 3 Article 3

Spring 3-1-1981

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NATURE OF A BUSINESS LICENSE TAX

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I. EARLY HISTORY

South Carolina's first constitution, the Constitution of 1776, declared that its power was derived from the people: "this Congress [is] a full and free representation of the people of this colony."[1] The second constitution provided that the "legislative authority be vested in a general assembly" to consist of a senate and house of representatives.[2] Government must exercise the grant of power in the manner prescribed in the charter. The early constitutions placed few substantive or procedural limitations upon the legislature. In the absence of an express, or necessarily implied, limitation upon the grant, "the power of the legislature in the matter is plenary."[3]

II. THE 1865 CONSTITUTION

Until 1865, the South Carolina Constitution contained no specific limitations on the taxing power of the legislature. In the colonial period, land was taxed at a fixed rate per acre.[4] Following the Revolution, the legislature adopted a system of land classification based on the nature of the land and its location to more closely approximate actual value. The legislature established ten classes of property (many contained subclassifications) and placed a per acre value on them.[5] This method was

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1. S.C. CONST. of 1776, art. I. This article is found at 1 S.C. Stat. 128, 130.

2. S.C. CONST. of 1778, art. II. This article is found at 1 S.C. Stat. 137, 138.

3. Carrison v. Kershaw County, 83 S.C. 88, 90, 64 S.E. 1018, 1019 (1909).

> The supreme legislative power of the State is vested in the General Assembly; the provisions of our State Constitution are not a grant but a limitation of legislative power, so that the General Assembly may enact any law not expressly, or by clear implication, prohibited by the State or Federal Constitution.

Gaud v. Walker, 214 S.C. 451, 461-62, 53 S.E.2d 316, 320 (1949).

4. A tax of "five shillings for every hundred acres" was imposed, regardless of the actual value of the land. 2 S.C. Stat. 662, 671, No. 360, art. XXIV (1716).

5. The value ranged from $26 per acre for "tide swamps of the first quality" to $.20

the basis of the taxing system for eighty years.

Changing economic conditions, particularly the development of the up-country and the decline of the rice industry, required a different system. The historian David Wallace described the change:

> By up country development, the fixed classification of lands adopted in 1784 to correct the former injustice of taxing all lands at the same value had now come to work an injustice to the Low Country, where values had lagged. Therefore, it was enacted that all property should be assessed at its real value.[6]

The Constitutional Convention of 1865 amended the constitution to require a property tax system based on actual value. "All taxes upon property, real or personal, shall be laid upon the actual value of the property taxed, as the same shall be ascertained by an assessment made for the purpose of laying such tax."[7] The provision established a single standard for valuation—the actual value. Valuation by classes of property was prohibited. The provision was incomplete, however. Any tax system has two elements: the rate of tax and the valuation or measure of the object of the tax. Although the provision established the actual value standard, it did not require that an equal and uniform rate of tax be applied against it. Arguably, the provision could have been interpreted to permit classification if accomplished by the use of different tax rates, not by valuation.

III. THE 1868 CONSTITUTION

The error was corrected in the next constitution. The existing actual value standard was continued,[8] but a new provision was added, which required a uniform and equal rate of tax.[9] The legislature also was authorized to vest local governments "with the power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same."[10]

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per acre for certain "fine barrens." 6 S.C. Stat. 7, No. 2079, art. I (1815). *See* 4 S.C. Stat. 627, No. 1234, art. I (1784).

6. 3 D. WALLACE, HISTORY OF SOUTH CAROLINA 238 (1934).
7. S.C. CONST. of 1865, art. I, § 8.
8. S.C. CONST. of 1868, art. I, § 36; art. II, § 33.
9. *Id.* art. IX, § 6.
10. *Id.* art. IX, § 8.

The 1868 Constitution made no specific mention of license taxes. In 1872, the legislature enacted "An Act to Provide for a General License Law."[11] Although the Act was repealed in the same year it was enacted,[12] it led to two important cases.[13]

The Act was administered by the county treasurers and auditors but all funds collected were for the "use of the State." The Act did not specify any object or purpose. Indeed, it did not characterize payments made under it as a "tax," or as a fee. It simply required the payment of money. The payments were required for the carrying on, or engaging in, or conducting of specified occupations. The statute used a wide variety of methods to measure the payment.[14]

Several railroad companies attacked the statute, and in *State v. Railroad Corporations,*[15] the court adopted a rule of substance over form. The court held that, although the legislature called the Act a license law, it, in fact, imposed a property tax. Consequently, the provision had to be tested against the constitutional standards applicable to property taxes. The Act was unconstitutional because a property tax had to be levied on actual value—not length of track. "It is a tax imposed on the road as property. It is not laid on its income, or any franchise or privilege, but measured solely by the length of the main track and branches."[16] The court thought that the conclusion was "so clear and undeniable that we shall content ourselves with a mere reference to the clauses of the Constitution" requiring that property be taxed at actual value. The court refused to be bound by legislative labels.

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11. 15 S.C. Stat. 195, No. 155 (1872).

12. The License Act was approved on March 13, 1872. On December 20, 1872, the Act was repealed, effective April 1, 1873. 15 S.C. Stat. 308, No. 221.

13. State v. Railroad Corps., 4 S.C. 376 (1873); State v. Hayne, 4 S.C. 403 (1873).

14. For example, the methods for some businesses include the following: banks—by amount of capital; railroads—by lengths of tracks; hotels, livery stables—by annual rental value; telegraph—by length of line; lawyers—flat fee; stores selling any merchandise—by annual sales; and express companies—flat fee.

Every railroad company, in the county of its principal offices, was required to pay specified amounts based on the length of its track, *i.e.,* (1) if a company owned less than 50 miles it paid $187.50; (2) 50-75 miles—$375; (3) 75-100 miles—$625; (4) 100-150 miles—$875; (5) 150-200 miles—$1,000; (6) 200-250 miles—$1,125; and (7) over 250 miles—$1,250. 15 S.C. Stat. 195, No. 155 (1872).

15. 4 S.C. 376 (1873).

16. *Id.* at 377.

In *State v. Hayne,*[17] also decided in 1873, the court was confronted with the question whether the legislature could impose any tax other than a property tax. The License Law required a payment of ten dollars from every person engaged in the profession or calling of attorney, physician, dentist, insurance agent, or architect.[18] Hayne, a lawyer in Charleston, continued to practice law without making the payment. He was indicted, found guilty, and fined twenty dollars. Hayne asserted that the act imposed a tax, that the detailed constitutional provisions dealing with the property tax were exhaustive, and by fair implication, that they prohibited the imposition of any other type of tax. The court agreed that it was in the nature of a tax, but rejected the main argument. The court held that the constitution did not expressly prohibit the imposition of other taxes and that such an essential governmental power should not be limited by the implication urged by the defendant.

The court concluded that the "right to levy taxes is conferred under the grant of general legislative power."[19] The particular provision dealing with property tax "assumes the existence of such power, and undertakes to prescribe the rule of its exercise where such exercise consists in the imposition of a tax of a particular description, namely, taxes upon property, real and personal."[20] Consequently, the legislature had the power to impose nonproperty taxes.

The court articulated standards that established the constitutional limitations on the power to impose nonproperty taxes: there must be equity and equality in all taxation and the license tax must act in aid of the property tax. The court held that "[t]he first clause [Article XI, section 1], namely, 'the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation,' is not, by its terms, applicable alone as peculiar to taxes on property."[21] It established the "rule of

17. 4 S.C. 403 (1873).

18. 15 S.C. Stat. 195, 200, No. 155, § 10 (1872).

19. 4 S.C. at 421.

20. *Id.*

21. *Id.* at 423 (quoting S.C. CONST. of 1868, art. IX, § 1). The severance of the first clause gave it independent significance from the second, a reverse of the situation in 1865-1868. There, a class was defined—the actual value of property—but there was no requirement that an equal rate of tax be applied to it. After *Hayne* a uniform and equal rate of tax was required but the class was undefined.

equality"[22] for all taxes: "it may be affirmed that the object and intent of the first clause was to introduce the principle of equality and uniformity into any and all classes of taxes that might be authorized by the Legislature . . . ."[23]

In *Hayne*, the court expressed the general theory of a just and equal system of taxation. All "that receive protection from the government should contribute to its support."[24] Government "not only protects the life, personal liberty and realized possessions of the citizen but protects him as well in respect to his occupation or means of obtaining support and making accumulations."[25] Different kinds of taxes complemented each other:

> The tax on property equalizes the burden fairly, so far as it is a contribution on account of the property held by the individual. If business or occupation, as distinguished from property, ought to contribute its share, then some other mode of taxation than those enumerated must be resorted to.[26]

There are two classes of business. In one class, profits bear some relation to the capital employed. The property tax may, to a certain extent, reach these businesses although the result is imperfect. In the second class of business, capital is not a material factor in the production of income and

> [a] property tax cannot, however, reach those occupations, so as to act as a tax on occupation, where no necessary relation exists between the amount of profits realized and the amount of capital employed. A single instance may be taken from the commercial classes that illustrates the whole question. A merchant usually requires capital invested in merchandise as the basis of his business operations; a broker, on the other hand, does not, beyond an inconsiderable amount, to enable him to conduct his business. The one pays taxes on his merchandise, considered as capital, the other pays nothing, so far as it regards the means employed for carrying on the business. The protection afforded by government is as important to the broker or to the professional man as to the merchant; yet,

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22. 4 S.C. at 421.

23. *Id.* at 424. The provisions of article IX, § 8 remained in the 1895 Constitution in article X, § 1. They have been deleted by the 1977 amendments.

24. *Id.* at 426.

25. *Id.*

26. *Id.*

> under a tax laid on property, exclusively, he escapes contribution so far as the profits of his business are concerned.[27]

The court held that it was unreasonable "to exempt, by the Constitution, certain persons pursuing particular avocations from the necessity of contributing to the support of the government . . . ."[28] and concluded: "We find, therefore, no ground in the Constitution for excluding the Legislature from resorting to *a tax on occupations in aid of taxes imposed on property.*"[29] The emphasized language is subject to the interpretation that a license tax *not* in aid of the property tax would be invalid. In sum, the idea that a license tax should act in aid of the property tax is intrinsic to the nature of a license tax.

In 1874, another license tax case, *State v. City of Columbia,*[30] reached the court. The legislature in 1871 had specifically authorized the City of Columbia to impose a "reasonable charge or tax" on all persons and corporations engaged in business.[31] The city ordinance varied the fee according to the occupation.[32] Several banks challenged this ordinance and argued that the charge imposed upon them could not be considered a tax; it was a license fee, which was illegal. It was illegal because banking was a lawful occupation, and a license fee "necessarily implies a right to control the business . . ., either by prohibiting its exercise or permitting such exercise only upon conditions imposed according to the discretion of the city authorities."[33]

The court agreed that this was historically correct:

> Strictly speaking, a license of a trade or calling by a municipal corporation is referable to the police power possessed by such bodies, and implies authority to prohibit the exercise of such business, except upon conditions having reference to some end of police regulation. In its simplest form of exercise,

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27. *Id.* at 427.
28. *Id.*
29. *Id.* at 428 (emphasis added).
30. 6 S.C. 1 (1874).
31. 14 S.C. Stat. 572, No. 343, § 8 (1871).
32. The ordinance required an annual fee of $100 for astrologers; $25 for lawyers; $200 for banks and bankers; and for billiard halls, $50 for the first table and $25 for each additional table. Retail stores were classified by the amount of annual sales. Approximately eighty additional occupations were specified and a fee was fixed for each class. Columbia, S.C., Ordinance to Regulate Licenses for the Year 1873 (Dec. 23, 1872).
33. 6 S.C. at 5.

> as where employed solely for the purpose of regulating avocations of a class tending to disturb public order, health or morality, it is a power totally distinct from that of imposing taxes for the purpose of raising revenue.[34]

In this situation (*e.g.*, licensing taxis or pawnbrokers), the licensing was intended to regulate the conduct of the undertaking and the fee had to be related to the cost of enforcement. But in its next stage, the license tax, as the court noted, had

> been long employed for the purpose of imposing, on a class of avocations to which the exercise of that power particularly relates, embracing places of public entertainment and amusement, taxation for the purpose of revenue of an extraordinary character, based upon the idea that avocations of that class should contribute specially to the support of the government in excess of the burdens borne by the productive industries.[35]

In the last historical stage, the court found that the license tax was imposed on lawful occupations "where circumstances of a peculiar nature" made "special taxes" appropriate.

> In this way it became one of the customary modes of raising revenue. The extension of this mode of raising revenue beyond the sphere of avocations to which the power of police regulation properly related, where circumstances of a peculiar nature rendered it requisite that each particular avocation should have its own rate of taxation, was natural where taxation had divided itself into two methods, . . . [the general property tax imposing an equal rate on actual value and another] such as could be treated in no other way than by subdivision into distinct classes . . . [with separate rates] . . . . [T]he license, as a form of collecting special taxes, has been frequently extended to embrace all subjects of taxation calling for special rates of taxation.[36]

In *City of Columbia*, the court continued to apply substance over form—"always looking rather to substance than to names in fixing the nature of an imposition by way of license."[37] The court expressly considered whether the license tax "in effect

34. *Id.* at 6.
35. *Id.*
36. *Id.*
37. *Id.*

taxes property" without regard to appropriate standards and found that it did not.[38]

The *Hayne* and *City of Columbia* cases established the standards to be applied to a license tax: (1) the court will look to the substance of the tax, not its form, to determine whether it is a license tax; (2) a license tax must be equitable; (3) a license tax is in aid of the general property tax; and (4) a license tax is a special tax and classification must be rationally based on services provided by the government. A high tax must be based upon special or disproportionate services rendered.[39]

IV. THE 1895 CONSTITUTION

There were two specific references to license taxes in the Constitution of 1895. One was in a proviso clause to the basic taxation section, which required a "uniform and equal rate" of taxation.[40] The proviso clause created an exception: "the General Assembly may provide for a graduated tax on incomes, and for a graduated license on occupations and business."[41] Although, the United States Supreme Court found the Federal Income Tax Act unconstitutional,[42] the South Carolina Constitution of 1895 assured that such a tax would be valid in South Carolina.

The second reference to a license tax was in the section regarding the delegation of taxing power to municipal corporations:

> The corporate authorities of cities and towns in this State shall be vested with power to assess and collect taxes for corporate purposes, said taxes to be uniform in respect to persons and property within the jurisdiction of the body composing the same; and all the property, except such as is exempt by law, within the limits of cities and towns shall be taxed for the payment of debts contracted under authority of law. *License or privilege taxes imposed shall be graduated so as to secure a*

38. *Id.* at 9.

39. Recent South Carolina Supreme Court decisions have reaffirmed these principles. *See, e.g.*, notes 123-29 and accompanying text *infra*.

40. S.C. CONST. of 1895, art. X, § 1.

41. *Id.*

42. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, *rehearing*, 158 U.S. 601 (1895).

just imposition of such tax upon the classes subject thereto.[43]

Although these two provisions made no substantial change in existing law, the requirement of a graduated tax precluded the imposition of a flat fee tax.[44]

In *Hill v. City Council,*[45] the court affirmed the standards to be applied to license taxes and discussed presumptions and burdens of proof. The City Council of Abbeville had enacted an ordinance that imposed a tax of $50 on a bank that had capital of $75,000 and a tax of only $75 on a cotton mill with $500,000 of capital. The taxpayer argued that, on the face of the ordinance, it was discriminatory because it did not reach all classes. The court rejected the argument and noted that

> [a]s all callings, occupations and kinds of business differ more or less, the one from the other, the very power to impose a tax that will be just on each class "involves the right to make distinctions between different trades and between essentially different methods of conducting the same general character of business or trade," and what is a reasonable license fee, must depend *largely* upon the sound discretion of the city council.[46]

The lesson of *Hill* is that the taxpayer has to produce underlying facts to be successful. If reasonable classification is "largely" within the discretion of the city council, the burden of going forward appears to be on the taxpayer. The taxpayer based his arguments on the face of the ordinance, maintaining that "bankers are exempt, that the taxation is not just, as it does not reach all classes . . . ."[47] This showing, according to the court, was insufficient, but what would be sufficient was not clear.

A taxpayer succeeded two years later, however, in *Standard Oil Co. v. Spartanburg.*[48] A city ordinance imposed a license tax on the business of selling oil. The tax of $250 was payable by any merchant who sold fifty gallons or more of oil. The tax did

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43. S.C. CONST. of 1895, art. VIII, § 6 (emphasis added).

44. Town of Forest Lake v. Town of Forest Acres, 227 S.C. 163, 87 S.E.2d 587 (1955).

45. 59 S.C. 396, 38 S.E. 11 (1901).

46. *Id.* at 427-28, 38 S.E. at 24 (quoting In re Haskell, 32 L.R.A. 527, 529 (1896)) (emphasis added).

47. *Id.* at 429, 38 S.E. at 24.

48. 66 S.C. 37, 44 S.E. 377 (1903).

not apply to merchants who resold oil on which the license had been paid. The taxpayer asserted that the tax was unconstitutional and discriminatory in three respects: (1) it did not apply to merchants selling in quantities under fifty gallons; (2) it did not apply to merchants selling oil on which the license had been paid; and (3) it did not apply to merchants engaged in other lines of business. The court rejected the first and third arguments.[49] The exemption of merchants who sold oil on which the tax had been paid was held void, however, because the exemption had no reasonable basis, it did not benefit the city or those who paid the tax nor did it encourage commerce.[50] The court concluded that the exemption "was intended as a mere favor to those included within the classification."[51]

A few months later, *Standard Oil* was distinguished in *Cowart v. City Council.*[52] A Greenville ordinance divided persons engaged in the business of lending money into four different classes. Plaintiff objected to the class in which he had been placed, those lending money upon personal property security, the most heavily taxed class. The class had three exceptions: a regularly established bank; time dealers making advances for agricultural supplies; and loan, savings, or investment companies. He argued that the classification was discriminatory.

The city presented testimony "that there ha[d] grown up in the City of Greenville a species of money lending by the week or month to individuals, sums of money ranging from $10 and upwards, upon which by renewals required and enforced at the end of each month, as much as $6 as interest on $10 is realized each year."[53] The court noted that the city's imposition of the prescribed classification was justified for revenue production, and was within the exercise of the city's police power. "[T]hese private dealers in loans on personal property may be anything they choose. They are or may be here to-day and yonder on the morrow. Like the Arabs, they may fold their tents and be off at any moment."[54] *Standard Oil,* "set up by the plaintiff," was

49. *Id.* at 41, 44 S.E. at 378 (citing Hill v. City Council, 59 S.C. 396, 38 S.E. 11 (1903)).

50. *Id.* at 45, 44 S.E. at 380.

51. *Id.* at 46, 44 S.E. at 380.

52. 67 S.C. 35, 45 S.E. 122 (1903).

53. *Id.* at 42-43, 45 S.E. at 125.

54. *Id.* at 43, 45 S.E. at 125. The court discussed *Hill* and Simmons v. Western

found "dissimilar."[55]

In *City of Laurens v. Anderson*,[56] an exemption of all Confederate soldiers from the payment of any license tax was declared void. The exemption was unconstitutional because it was unreasonable.[57] A similar issue was presented in *Carroll v. Town of York*.[58] The town had adopted a license ordinance pursuant to a state statute that authorized a "license . . . graduated according to the gross income of the persons, firms or corporations required to pay such license, or upon the amount of capital invested in said business."[59] The statute exempted any person engaged in the purchase or sale of cotton and did not apply to cities of more than 50,000 nor to Sumter, Clarendon, Orangeburg, or Greenville. The York ordinance applied to all occupations, including the sale of cotton. Carroll, a cotton seller, protested the payment claiming that he was exempt under state law.

The court held that the exemption was unconstitutional because the constitutional requirement that the legislature "provide by general laws for the organization and classification"[60] of cities was not met when "4 other towns admittedly in her class have not been restricted to collect the same tax . . . ."[61] The court continued: "the restriction laid upon some 40 towns was with reference to the State's staple agricultural product. There is no reason why four towns of the State should have the power to levy a license tax upon the vendors of cotton while 40 other towns were prohibited to do so."[62]

The circuit court had found that the constitution gave the town "an inherent right to collect a license tax" which could not

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Union Tel. Co., 63 S.C. 425, 41 S.E. 521 (1902), an unrelated case in which the court held that equal protection classification " 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed;' . . . [or be] 'based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification . . . .' " 63 S.C. at 431, 41 S.E. at 522-23 (quoting Gulf, Colo. & S.F. Ry. Co. v. Ellis, 165 U.S. 150, 155, 165 (1897)).

55. 67 S.C. at 45, 45 S.E. at 126.

56. 75 S.C. 62, 55 S.E. 136 (1906).

57. 75 S.C. at 64, 55 S.E. at 136. The court quoted the language of Gulf, Colo. & S.F. Ry. Co. v. Ellis, 165 U.S. 150, 155, 165 (1897).

58. 109 S.C. 1, 95 S.E. 121 (1918).

59. *Id.* at 2, 95 S.E. at 122.

60. S.C. CONST. of 1895, art. VIII, § 1.

61. 109 S.C. at 7, 95 S.E. at 123.

62. *Id.*

be limited by the legislature.[63] The supreme court, in dictum, disagreed. Although the court recognized that the 1895 Constitution, for the first time, made two specific references to license taxes, it concluded that "the new Constitution has not modified the general rule of law that the legislative branch of the government has the exclusive power of taxation, but may delegate it to towns for municipal purposes and may, therefore, restrict the towns in that respect."[64] The constitutional provisions were not self-executing.

In *Ex parte Bates*,[65] a license tax was invalidated because it was unreasonably high. The Sumter license ordinance imposed a tax of $300 per day on the business of auctioning horses and mules, and, if annual gross income exceeded $2,000, an additional 2½% of the excess was charged. Bates, a member of a firm of livestock dealers doing business in Sumter, was arrested when he attempted to conduct a horse and mule auction without paying the license tax. The case was before the supreme court on a motion of habeas corpus. The court found:

> It would seem a reasonably low estimate that auction sales would be held by one who established such a business, at least once a month for three months in the year; and if he should sell $10,000 worth at each sale, his gross income would be $30,000. If he should be charged for only three days in the year, the license tax would be $300 plus 2 ½ percent of $8,000, $200, $500 for each day, $1,500 for the three days, *a tax of 5 percent on his gross income.*[66]

Such a tax was unreasonable in amount. The court concluded that "[t]he ordinance clearly violates the limitations contained in the statute, in that it fixes an unreasonable sum for the license, does not graduate the license fairly according to gross income or according to capital invested, and is void."[67]

Ex parte Bates is important because it established that a license tax must be reasonable in amount and recognized that a license tax is simply an authorization to engage in a business, not a substitute for property and income taxes. It is a special

63. *Id.* at 5, 95 S.E. at 122.
64. *Id.* at 10, 95 S.E. at 124.
65. 127 S.C. 167, 120 S.E. 717 (1923).
66. *Id.* at 172, 120 S.E. at 718 (emphasis added).
67. *Id.* at 173, 120 S.E. at 719.

tax, not a major or general source of revenue; it is has a different theoretical justification. The services provided by the city have no relation to gross income. An insurance company with gross income of $5 million would not require more services than a similar company with gross income of $1 million. The same reasoning supports a dollar maximum amount on the tax that any one licensee is required to pay.[68]

A state license tax was held unconstitutional in the 1930 decision, *Martin v. Chief Game Warden.*[69] The Hide Buyer's Act required a statewide license tax of $200 for nonresidents. A resident in the same business was required to pay $25 per county, and if he did business in more than eight counties, he would pay a higher tax than a nonresident. The court found that this was an "unconstitutional discrimination against a resident buyer."[70] In addition, the tax was void because it was not graduated.

Two years later, in *Pee Dee Chair Co. v. City of Camden,*[71] the court identified the applicable rule of construction for license tax laws:

> A statute or an ordinance requiring a business license or imposing a license or occupation tax must be construed liberally in favor of the citizen and strictly against the government, and no one can be held to payment of the tax unless he comes clearly within the terms of the particular statute or ordinance.[72]

The issue in the case was whether a Darlington manufacturing company was doing business in Camden when it delivered one lot of furniture to a retail dealer in Camden. Camden asserted that the company was engaged in the business of "trucks hauling merchandise." The court noted that although a single act, under certain circumstances, would constitute "doing business," the manufacturing company's act was simply an isolated, incidental, or casual delivery.[73] The furniture company could not be taxed

68. For many years the South Carolina Legislature placed such a cap on municipal license taxes—$2,500 for cities with a population of more than 40,000. 1904 S.C. Acts 396, No. 213.

69. 160 S.C. 370, 158 S.E. 731 (1930).

70. *Id.* at 373, 158 S.E. at 732-33.

71. 165 S.C. 86, 162 S.E. 771 (1932).

72. *Id.* at 89, 162 S.E. at 772.

73. *Id.* at 93, 162 S.E. at 774.

by Camden.

Spartanburg was permitted to classify chain stores differently than individual stores in *Great A & P Tea Co. v. City of Spartanburg.*[74] Retail merchants were divided into six classes, according to the number of stores owned. Very different rates were charged. For example, a single store owner paid $7.50 for the first $5,000 of gross income and $1.50 for each additional $1,000; an owner of six stores paid $100 for the first $5,000 of gross income and $5.00 for each additional $1,000.

The court found a valid basis for the classification:

> The six-store merchant likely puts a six times greater strain upon the fire and police departments than does the one-store merchant, and uses the streets for perhaps more than six times as many stocking and delivery operations. The chain store, in reality conducting a combination wholesale and retail business from its regional warehouses through its local outlets, daily uses the streets with its large trucks and trailers, making them serve as freight highways, accentuating traffic problems, and subjecting the streets to extraordinary wear and tear. The public provides the streets, the police and fire protection. The public provides the community; the chain store selects from a consideration of the public facilities and protections.[75]

These considerations, the court concluded, made "a clear distinction between the classes in the manner and method of doing business, in the hazard to public welfare and in the tax on the public facilities."[76] In *Great A & P Tea Co.*, the court focused on the large trucks that subjected the streets to extraordinary wear and tear. This is the first case to expressly relate a license tax and its reasonableness to the services provided by the city, expressed as "the hazard to public welfare" and "the tax on the public facilities."[77]

Pee Dee Chair was distinguished in *Crosswell & Co. v. Town of Bishopville.*[78] A license tax had been imposed on a Sumter grocer who made deliveries in Bishopville once or twice a week. This was held to be a continuity of business, unlike the

74. 170 S.C. 262, 170 S.E. 273 (1933).
75. *Id.* at 271, 170 S.E. at 276.
76. *Id.*
77. *Id.*
78. 172 S.C. 26, 172 S.E. 698 (1934).

single isolated act in *Pee Dee Chair*. Although the Bishopville tax did not apply to resident grocers, the court concluded that "the merchant residing in another town may be placed in a different class from the local merchant."[79]

The Sumter license tax ordinance was again before the court in *American Bakeries Co. v. City of Sumter*.[80] Generally, bakeries were charged a $25 tax but those with an established place of business beyond the Sumter town limits that sold or delivered products to Sumter by trucks or otherwise were charged a tax of $50. The circuit judge found that because the tax was not graduated, it was void. The supreme court, however, held that the record was not adequate to show a lack of graduation and upheld the tax.

> Courts have been quite liberal in according to municipalities the right to classify the subjects to license taxes, and such classifications are generally upheld where the subjects are in different conditions; where the selection is not capricious and arbitrary; where there exists a reasonable ground for difference or policy.[81]

As in *Crosswell & Co.*, the court found that nonresidence alone justified a distinction because there was no indication of any difference in the manner in which the business was conducted. Perhaps the inarticulated point in *Crosswell & Co.* and *American Bakeries* is that a higher license tax on nonresidents will compensate—to some extent—the property tax paid by residents.

Southern Fruit Co. v. Porter[82] raised the question whether the use of the streets justified a high license tax. Plaintiffs were nonresident corporations with principal places of business in North Carolina and Georgia. They had no warehouse in South Carolina. Plaintiffs' salesmen solicited orders from retail merchants in various South Carolina cities and towns. Upon receipt of the orders at the principal place of business, the goods were loaded on company trucks and delivered to the customers.

A number of towns and cities had passed ordinances variously designated as a tax "for the use and occupation of streets,"

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79. *Id.* at 30, 172 S.E. at 700.
80. 173 S.C. 94, 174 S.E. 919 (1934).
81. *Id.* at 97, 174 S.E. at 920.
82. 188 S.C. 422, 199 S.E. 537 (1938).

a "delivery license tax," a "privilege tax," an "occupational tax," and a tax "for the use of streets."[83] These statutes were special, that is, they were not part of a general license tax ordinance. The municipalities relied on a section of the South Carolina Code of 1932,[84] which authorized "ordinances respecting the roads [and] streets" for the health, welfare, and order of the city. The court held that

> any and all ordiances [*sic*] enacted under this section must be in the exercise of the police power . . . . [A]n Act or ordinance imposing a license tax under the police power as a means of regulation is valid, only when it is within the limits of such power and is intended for regulation; otherwise it is invalid, as where the license tax is imposed for revenue purposes, in the guise of a police regulation.[85]

Municipalities could regulate speed, parking, and traffic generally. The ordinances in question did not purport to regulate or restrict the use of trucks; they were intended to produce revenue. The ordinances were struck down because they were not authorized by the police power.

The cities made no argument that the statutes were authorized by state laws permitting municipalities to impose license taxes on the privilege of engaging in business. These taxes could be imposed to produce revenue. Presumably this argument was not made because the tax was for the privilege of using the streets, not the privilege of engaging in business.

The court stated that the legislature could authorize a municipality to impose a reasonable tax "for the exercise of the privilege of using the streets."[86] The legislature, however, had not yet done so and "[s]uch specific taxing power not having been conferred, any ordinance exacting a license for the use of the streets is invalid."[87]

> The right to travel on and along the streets of a city belongs to the general public. An ordinance cannot legally be made which contravenes a common right, unless the power to do so be plainly conferred by a valid and competent legislative

83. *Id.* at 426, 199 S.E. at 539.
84. 1898 S.C. Acts 820, No. 522.
85. 188 S.C. at 428, 199 S.E. at 539.
86. *Id.* at 430, 199 S.E. at 540.
87. *Id.*

> grant. . . . Municipalities may, of course, regulate the speed of vehicles moving along its streets, provide for proper parking, and otherwise regulate traffic conditions. The use of the public streets of a city by the public is not a privilege, but a right, and a tax for such use can be exacted only under the authority of legislative sanction. And the authority to impose a tax or to exact a license must clearly appear, and must be strictly construed. If there is a doubt as to the right to tax, it must be resolved adversely to this right. In this case there is no express power given to cities and towns of this State to impose this tax or license fee, and no implied power arises which gives the right. Cities and towns of this State cannot exercise the power of taxation for the use and occupation of streets by the traveling public, under the guise of a license or otherwise, unless such power is unequivocally conferred upon them by the legislature. When such power is clearly conferred Courts have generally upheld the proper exercise thereof.[88]

The court also discussed the burden of the tax on interstate commerce. Although a tax, or a reasonable toll, might be imposed on interstate commerce as compensation for the use of the highway or a bridge, it could not be a general revenue tax. The latter would be a burden on interstate commerce and, thus, would be prohibited.

In 1946, the court decided another tax jurisdiction case, *Triplett v. City of Chester*.[89] A general building and highway construction contractor conducted his administrative and executive work at his central office in Chester and stored equipment in the city. The contractor maintained that no part of his business (by which he meant actual construction work) was done in Chester.

The city was authorized to impose a license tax on persons engaged in business "in whole or in part, within the limits" of the city.[90] The court concluded that the contractor was subject to the tax:

> We find no reasonable justification for a construction of this ordinance which would make the liability for the payment of a license contingent upon all of the functions of the taxpayer's

88. *Id.* at 429-30, 199 S.E. at 540 (citation omitted).
89. 209 S.C. 455, 40 S.E.2d 684 (1946).
90. 1939 S.C. Acts 137, No. 96 (repealed 1975).

> business being performed within the City of Chester. It was not contemplated that the various phases of a business should be segregated and only that part taxed which was actually carried or within the corporate limits.[91]

The next case of interest is the 1955 decision, *Town of Forest Lake v. Town of Forest Acres.*[92] Forest Acres had imposed a license tax on every merchant or other person doing business at retail. The charge was a minimum fee of $5 with an additional $.50 imposed on each $1,000 of sales in excess of the minimum (*i.e.*, above $10,000). Some businesses, however, were charged flat fees that were not related to gross income.[93]

The court held that the flat fee provisions were unconstitutional because a "license must be graduated as to the affected classification in compliance with the provisions of the Constitution and Statute . . . ."[94] The court held that the general provisions of the ordinance were severable and valid. Without discussion, the court upheld the imposition of the minimum fee, which also appeared vulnerable to attack because of a lack of graduation. After *Town of Forest Acres,* the use of minimum fees with an additional tax graduated by gross income became common.

V. THE INSURANCE COMPANY CASES—1962-1979

Since 1962, insurance companies have brought a number of cases concerning license taxes to the South Carolina Supreme Court. The results have been generally unfavorable for the taxpayers.

A license law, which imposed a tax of 2% of the gross premiums of fire and casualty companies was contested in *City of Columbia v. Putnam.*[95] The 2% tax included premiums collected through offices or agents located in the city or collected on policies written on property located in the city. The ordinance did not set a maximum amount. Based on gross premiums, the Southern Farm Bureau Casualty Insurance Company owed the city $25,000. The company refused to pay, and its manager, Put-

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91. 209 S.C. at 462, 40 S.E.2d at 687. *See also* 1975 *Op. S.C. Att'y Gen.* 251.

92. 227 S.C. 163, 87 S.E.2d 587 (1955).

93. For example, barbers paid $20 for each chair; building and loan associations paid $50; real estate agents paid $25. *Id.* at 165, 87 S.E.2d at 588.

94. *Id.* at 167, 87 S.E.2d at 589.

95. 241 S.C. 195, 127 S.E.2d 631 (1962).

nam, was convicted for failure to pay the tax. Putnam argued that, on its face, the ordinance was void since it did not conform to the enabling act—it set no maximum on the tax.[96] The court, in effect, judicially amended the ordinance to read in the limitation and held the ordinance valid.

Putnam also argued that the ordinance was, as a matter of law, discriminatory, arbitrary, and unreasonable. Fire and casualty companies were treated differently from life, health, and hospital companies, a clear discrimination. The court rejected the argument.

> The power of a municipality to fix different rates for licenses where the classes are different has been upheld by this Court many times. . . .
>
> . . . .
>
> . . . The fact that one class may pay more proportionately than other classes does not of itself make the license fee unreasonable or arbitrary since this is largely within the discretion of City Council.[97]

The court also stated that the state legislature had treated fire companies as a separate class by providing that no license fee for a fire insurance company could be charged "in any other manner than on a percentage of the premiums."[98] The statute provided as follows: "such license fee not to exceed two percent of the premiums collected in such municipality except in cities of fifty thousand inhabitants or more where not exceeding five percent may be charged."[99] The fact of separate treatment by the legislature is "persuasive" that separate treatment by a municipality "is not discriminatory or unreasonable."[100]

In *City of Columbia v. Niagara Fire Insurance Co.*,[101] the

96. The enabling act provided that no license tax could exceed $1,000 except that the maximum could be raised to $2,500 by a two-thirds vote of the city council. 1904 S.C. Acts 396, No. 213 (repealed 1975).

97. 241 S.C. at 198-99, 127 S.E.2d at 633.

98. *Id.* at 199, 127 S.E.2d at 633.

99. As enacted in 1947, this provision specified premiums "collected in such municipality." 1947 S.C. Acts 322, No. 232. In 1961, it was amended to include premiums "realized from risks located" within the municipality regardless of where the premiums were collected. To avoid double taxation, the amendment provided a preference for the municipality where the property was located. 1961 S.C. Acts 273, No. 198 (current version at S.C. CODE ANN. § 38-5-490 (1976)).

100. 241 S.C. at 199, 127 S.E.2d at 634.

101. 249 S.C. 388, 154 S.E.2d 674 (1967).

computation of Niagara's 1963 license tax was at issue. The ordinance had provided that the tax be based on the business transacted in the preceding year. During 1962, the Eagle Fire Insurance Company did substantial business in Columbia. Eagle sold its business to Niagara, effective at 11:59 p.m. on December 31, 1962. The city claimed, and the court agreed, that the 1962 business of Niagara and Eagle should be combined to determine Niagara's tax. The court concluded that the combination was in accord with the intent of the ordinance.

> The obvious purpose of the license ordinance is to impose a tax, or license fee, upon the privilege of doing business in the city during the current year. *Implicit in that purpose is the requirement that the tax be fair and nondiscriminatory.* In many classes of business the license fee is calculated on gross receipts reasonably to be expected during the license year, using the amount of such receipts during the preceding year as a measure for computing the amount of the fee.[102]

The South Carolina Codes of 1952 and 1962 classified municipalities according to population for license tax purposes.[103] The license tax for the class of cities with populations of more than 70,000 was specifically limited to $2,500. There was no limitation imposed on the classes with smaller populations. In *Glens Falls Insurance Co. v. City of Columbia,*[104] the city of Columbia had imposed a 2% tax on gross premiums and argued that the $2,500 limitation applied to each agent of the company rather than the company as a whole. The court rejected this position and explained that the legislature intended to prevent municipalities in search of revenue from imposing an unreasonable and unconscionable license tax.

> In fixing a limitation in Section 47-407 on the amount of the license tax which might be imposed thereunder, it is a reasonable assumption that the Legislature had in mind prohibiting the imposition of an unreasonable or unconscionable tax. Since the assessment of the tax was graduated as to income,

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102. *Id.* at 392, 154 S.E.2d at 676 (emphasis added).

103. The classes were towns with a population of less than 1,000, S.C. CODE § 47-173 (1952); towns and cities with a population between 1,000 and 70,000, S.C. CODE § 47-271 (1952); and cities with a population greater than 70,000, S.C. CODE § 47-407 (1952) (these sections were repealed in 1975).

104. 242 S.C. 237, 130 S.E.2d 573 (1963).

> the payment of an unreasonable license tax in cities of smaller population was no doubt considered unlikely. This could have been reasonably considered a sufficient safeguard against the imposition of an unreasonable license tax. As stated in the order of the Circuit Court: "Doubtless the Legislature realizes that a city in its search for revenue might be inclined to require the payment of an unreasonable or unconscionable license tax and hence placed the restriction contained in Section 47-407 on the larger cities because no such figure would probably ever be reached in the smaller towns." The exact line of demarcation between the classification of cities to effect such result was a matter within the discretion of the Legislature.[105]

The code section applicable to cities with populations less than 70,000, which contained no specific limitation, was considered in *United States Fidelity & Guaranty Co. v. City of Newberry (Newberry I)*.[106] A city ordinance had imposed a 2% tax on the gross premiums of insurance companies. The taxpayer contended that the tax was confiscatory because the company was losing money. The tax, consequently, had to be paid out of capital.[107] The court rejected this position:

> [A]ppellant argues that the license tax is unreasonable because it is losing money as a property insurer. *We doubt that profits and losses are a proper consideration in determining reasonable amounts to be charged for licenses.* This is especially true when the taxpayer, as here, is regulated as to rates by a governmental agency and may procure an increase in rates upon a proper showing. *The profit or loss approach would appear to present a hopeless situation because one taxpayer within a classification might be making a profit while another*

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105. *Id.* at 245-46, 130 S.E.2d at 577-78. After *City of Columbia*, the legislature amended S.C. CODE § 47-407 (1952) to apply to cities over 70,000 *but under* 90,000 1965 S.C. Acts 588, No. 337. In United States Fidelity & Guar. Co. v. City of Greenville, 250 S.C. 136, 156 S.E.2d 417 (1967), the taxpayer argued that a $2,500 limitation should be read into S.C. CODE § 47-271 (1952), which applied to cities under 70,000 and contained no specific limitation. The court rejected the argument and noted: "There is no contention that the taxes imposed upon plaintiffs were discriminatory or unreasonable *per se*." *Id.* at 139, 156 S.E.2d at 418. Currently, S.C. CODE ANN. § 5-7-30 (1976), contains no specific limitations. In a proper case, the contention that a high license tax is unreasonable or excessive per se may have merit. As a license tax exceeds a normal range it takes on the characteristics of a general tax—usually a property tax. If it were a property tax, it would fail since it does not comply with the Constitution. S.C. CONST., art. X (1976).

106. 253 S.C. 197, 169 S.E.2d 599 (1969).

107. Brief of Appellant at 12.

> *might be losing money.* Many things bring about a loss or a profit and neither city council nor this court should be called upon to determine whether a loss is caused by poor business management or payment of a license tax or some other cause.[108]

This language is consistent with the nature of a license tax—a payment for the privilege of engaging in business. It is not a tax on the profits of a business; it is not an income tax. The measure of a license tax has always been gross income, not net income.

A special section of the South Carolina Code dealt with fire insurance companies and mandated that municipal license fees be charged on a percentage of the gross premiums collected. It further specified that such a charge could not exceed 2% in a city with a population under 50,000 or 5% in a city with a population of over 50,000. The trial court found that the section "shows that the Legislature accepts or recognizes that a 2 per cent license is not an unreasonable charge and also seems to place insurance companies in a special category."[109]

The taxpayer proferred as evidence of the gross disparity in the rates of taxation a comparison of the tax it paid with the tax on twenty other businesses. The comparison showed that fire and casualty companies paid 2% of gross receipts while most other businesses were taxed at much lower rates. The taxpayer argued that since he had showed a gross disparity in rates, the burden shifted to the city to justify the reasonableness of this classification: "The respondent City controls the knowledge of why the appellant's class of business is required to pay so much more than other classes for a license. If there were a justification, the respondent City should have produced evidence of it."[110]

The court disagreed: "One can only speculate on the question of the reasonableness by comparison. Reasonableness must be determined by the factual situation involved."[111] The court continued "*'In the absence of positive evidence to the contrary,* acts or ordinances licensing or taxing an occupation or privilege

108. 253 S.C. at 204, 169 S.E.2d at 603 (emphasis added).
109. Record at 15.
110. Brief of Appellant at 8.
111. 253 S.C. at 203, 169 S.E.2d at 603.

are presumed to be reasonable . . . .' "[112] The court concluded that "plaintiff has not met the burden of proof of showing that the license tax is unreasonable . . . ."[113]

The only reference to the issue of property tax equalization occurred in an amicus brief:

> Since, by their nature, these insurance companies do not have a need to own any appreciable amount of real or personal property, they pay little or no property taxes to support the City in contrast to the business whose rates they use for comparison in their argument.
>
> The City is limited in its sources of revenue, but it must provide equal services for all its inhabitants. Should these insurance companies not be required to make "equality of burden" a reality as well as the rule by paying their fair share of the total tax burden?"[114]

Neither the other briefs nor the court's opinion refer to the property tax issue.

Property tax equalization was a major issue in subsequent cases. In *United States Fidelity & Guaranty Co. v. City of Newberry (Newberry II),*[115] the city appealed from a summary judgment for the taxpayer, United States Fidelity and Guaranty Company (USFG). The mayor of the city had been deposed by the taxpayer and testified that USFG was the principal beneficiary of the fire and police services provided by the city.[116] Because USFG paid no property taxes the license tax was intended to equalize the costs. Although these arguments would subsequently be accepted, in *Newbery II,* they were made with little force and were surrounded with other weak and confused testimony. On appeal, the city claimed that a genuine issue of fact

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112. *Id.* at 204, 169 S.E.2d at 603 (quoting 53 C.J.S. *Licenses* § 16, at 511 (1948)) (emphasis added).

113. 253 S.C. at 204, 169 S.E.2d at 603.

114. Amicus Brief of the City of Columbia, S.C. at 6. The source of the quote "equity of burden" is not known.

115. 257 S.C. 433, 186 S.E.2d 239 (1972).

116. The mayor stated:

> That the maximum that could be charged was two percent and my feeling and the Council's feeling was that so many of these companies paid no *ad valorem* tax whatever to the City of Newberry, they do business here, yet our Fire Department and Police Department help protect property that they are insuring. Frankly, we don't feel that the two percent is excessive.

Record at 10.

existed with respect to the reasonableness of its classification. The city had asserted that the fire and casualty companies received special benefits from the police and fire services, that the companies paid no property tax, that the high license tax on them acted to equalize burden, and that the state legislature, in Section 37-133 of the 1962 South Carolina Code, had treated fire companies as a separate class and also established 2% of gross premiums as a reasonable rate. The court discussed only the last point: "Such officials relied, largely, upon Code Sec. 37-133 . . ." The court's failure to discuss the first two points is assumed to mean that it rejected them as immaterial. The court rejected the use of section 37-133 to "form a rational basis for charging these particular taxpayers at a rate twenty times as much for a business license as most other business enterprises pay."[117] Referring to *Newberry I,* the court stated:

> As was pointed out . . ., in the absence of positive evidence to the contrary, the license tax here imposed upon the plaintiff is presumed to be reasonable and not to be interfered with by the courts, unless its unreasonableness and oppressiveness are clearly apparent, the burden of proving invalidity being upon the plaintiff.[118]

In the present case, the court continued, while mindful that the ordinance is presumed valid, the lower court had a "sound factual basis for concluding that the plaintiff had, at least *prima facie,* met the burden of proving the tax palpably unreasonable."[119] The court framed the issue: Had the city any rational basis for the gross disparity of its rates?

> It is conceded that the city had the right to classify for the purpose of license taxes and considerable discretion as to the rate to be imposed upon the respective classifications, but the cardinal issue here is whether the city had any rational basis for such a gross disparity and differentiation between the rate charged property insurers, such as the plaintiff, and those charged to the various other business and professional licensees.[120]

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117. 257 S.C. at 441, 186 S.E.2d at 242-43.

118. *Id.* at 438, 186 S.E.2d at 241.

119. *Id.* at 439, 186 S.E.2d at 241.

120. *Id.* The court cited an earlier decision interpreting the equal protection clause in a license tax context:

The following is quoted at some length because it states the essential legal principles found by the court.

> "The obvious purpose of the license ordinance is to impose a tax, or license fee, upon the privilege of doing business in the city during the current year. Implicit in that purpose is the requirement that the tax be fair and nondiscriminatory."
>
> *In all of our decisions wherein a classification in a tax statute or ordinance has been challenged as being in violation of the equal protection clauses of the state and federal Constitutions, this Court has recognized that a reasonable basis for the different treatment was essential to the constitutionality thereof.* In Laurens v. Anderson, . . ., and Standard Oil Co. v. City of Spartanburg, . . . , exemptions in license ordinances were held constitutionally invalid for lack of a rational basis therefor. In Wingfield v. South Carolina Tax Commission, . . .; Cowart v. Greenville, . . ., and Great A. & P. Tea Co. v. City of Spartanburg, . . ., classifications and differing tax rates were upheld. The Court, in each of these, recognized the *essentiality of a rational basis for the classification* and differentiation in tax rates *and pointed to the facts which constituted such bases.*[121]

Rather than simply affirm the decision in favor of the taxpayer, the court remanded the case to permit the city to develop any relevant factual issues, because it appeared that about seventy other municipalities had comparable taxes on fire and casualty companies. That, the court believed, made the "case one of grave public importance."[122]

Following the decision, the city lawyers met with USFG's lawyers and took the position that they had developed all the facts. Consequently, they were agreeable to a settlement of the

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"[C]lassification must not be arbitrary—that is, 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed—'."

Compliance with the equal protection clauses of the Constitutions requires that any classification be not arbitrary and bear a reasonable relation to the legislative purpose sought to be effected, and that all members of each class be treated alike under similar circumstances.

Id. at 439-40, 186 S.E.2d at 241-42 (quoting City of Laurens v. Anderson, 75 S.C. 62, 55 S.E. 136 (1906)).

121. *Id.* at 440-41, 186 S.E.2d at 242 (quoting City of Columbia v. Niagara Fire Ins. Co., 249 S.C. 388, 154 S.E.2d 674 (1967)) (emphasis added).

122. *Id.* at 442, 186 S.E.2d at 243.

case on terms favorable to USFG. Other cases, in which USFG was a part, were also settled on a favorable basis at that time.

For the license year 1972, USFG paid a tax under protest to the city of Spartanburg. The challenge produced the decision in *United States Fidelity & Guaranty Co. v. City of Spartanburg (Spartanburg I)*.[123] The mayor of Spartanburg testified at trial that the classification was justified because it equalized the property tax and compensated for special services.[124] The validity of the taxing ordinance was upheld and USFG appealed. The supreme court made clear that it intended no change in the law: "The law in this field has been recently reviewed and expounded in . . . [*Newberry I* and *Newberry II*] and will not be repeated here."[125] The question was one of fact and the state of the record.

USFG, at the time of the mayor's deposition, believed that the justifications had been rejected by the supreme court and referred to them as "frivolous."[126] The court, however, stated:

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123. 263 S.C. 169, 209 S.E.2d 36 (1974).

124. His example was Southern Bell:

> Q. Now, earlier I asked you if there were any other categories than Casualty and Fire Companies which paid as much as two per cent except, of course, for Duke Power Company, and I believe your answer was no; why would a—what fact that you know of distinguishes for the purpose of license taxation a fire insurance company from any other type of business?
>
> A. Well, to begin with, very few of them pay property taxes and when you start to set up your business license fees for the support of the city budget there are two or three factors that you consider and one of them is whether or not the company pays city license fees; secondly, whether or not the city's services directly benefit that particular company more than—those types of companies more than others. Of course, here you get practically no real estate or personal property taxes, whereas if you take a company like Southern Bell you get some two hundred thousand dollars a year, I believe, in taxes alone plus the license fee.
>
> Q. Now, excuse me, may I interrupt to ask a question about Southern Bell. With respect to the two hundred thousand dollars that you get there, what is that based on?
>
> A. That's based on the real estate and personal property; they don't have so much real estate but they have considerable personal inventory.
>
> Q. And so this has been taken into account, the fact that Southern Bell pays an *ad valorem* tax of some two hundred thousand dollars per year in arriving at its license rate?
>
> A. Yes.

Record at 30-31.

125. 263 S.C. at 172, 209 S.E.2d at 37.

126. Brief of Appellant at 9.

> The experienced and knowledgeable mayor of Spartanburg testified that city council had from time to time reviewed the ordinance in an effort to arrive at fair rates of taxation. In council's opinion the rate under attack is not unreasonable for two principal reasons. . . . Fire and casualty insurers receive more benefit than other businesses from two of the City's most expensive and efficient services, fire and police protection. . . . Such insurers pay little, if any, ad valorem tax and, inferentially, contribute substantially to the cost of city government only by the business license tax.[127]

The court accepted the special services justification, stating that the existence of police and fire departments and their "undoubted relevance to the fire and casualty insurance business were simply considered by council in fixing the license tax rate."[128]

The court also accepted the property tax justification:

> Appellant insists that to relate the higher license tax to the fact that businesses of this class are not substantially subject to the City's ad valorem tax amounts to a penalty for not owning property in Spartanburg, which the City has no right to impose. But it seems reasonable that fire and casualty insurers, who annually collect millions of dollars in premiums from the inhabitants of a city, should make more than a minimal contribution to the government of the city. The case for the validity of the license tax is that the rate was fixed in the exercise of council's judgment as to a fair rate or business license tax on fire and casualty insurers. Arguably, an intelligent judgment required consideration of the fact that these businesses were substantially unaffected by the City's principal source of revenue, the ad valorem tax, which bore heavily on some other licensees.[129]

Although the court did not cite the 1873 *Hayne* decision, which held that it is inherent in the nature of a license tax that it act in aid of the property tax,[130] the court reached the same conclusion. Further, the court found that USFG had not met its burden:

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127. 263 S.C. at 172-73, 209 S.E.2d at 37.

128. *Id.* at 174, 209 S.E.2d at 38.

129. *Id.*

130. State v. Hayne, 4 S.C. 403 (1873). See notes 19-29 and accompanying text *supra.*

> The license tax here imposed upon the appellant is presumed to be reasonable, and the burden of proving otherwise is upon it. Appellant asks us to hold that this burden has been met because the ordinance taxes it eight times more than it taxes the majority of other businesses, and twice as much as the next highest business, and because it has shown that no reason exists which can justify this inequality of treatment. On this record, we are not convinced that the bases advanced by the City for assessing a higher rate of business license tax against appellant are irrational, or that the resulting rate is so palpably unreasonable as to justify our interference.[131]

The same parties were before the court again in *United States Fidelity & Guaranty Co. v. City of Spartanburg (Spartanburg II)*.[132] USFG had paid the license tax in 1973, 1974, and 1975 under protest. The city moved for summary judgment asserting that no genuine issue of fact existed and that the legal issue had been decided against plaintiff in *Spartanburg I*. The circuit judge denied the motion and ruled that USFG was "entitled to develop any factual issues which may be different from the issues concluded by the judgment in the 1971 and 1972 cases."[133] The city appealed to the supreme court, which dismissed the appeal on the grounds that an order denying summary judgment is an interlocutory decision and not directly appealable.

The actions were then referred to a master in equity. USFG argued that the city had no rational basis for the disparity of rates. It presented evidence that the city's protective services contributed to lowering premium charges to customers, resulting in reduced company profits, which are a ratio of the premium rate. After this evidence was presented, the city abandoned the justification of special benefits.

The second issue, property tax equalization, was more difficult. USFG had paid no property tax. If it is a correct legal principle that a license tax should act in aid of a property tax, then some equalization was required. USFG did not dispute this legal principle, but did argue that the result of the license tax was not equalization, but inequity.

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131. 263 S.C. at 175, 209 S.E.2d at 38.
132. 267 S.C. 210, 227 S.E.2d 188 (1976).
133. *Id.* at 211, 227 S.E.2d at 189.

When the property tax was added to the license tax of fourteen specified businesses, three utilities franchised by the city paid licensee taxes and *ad valorem* taxes in sums greater than USFG's tax payment, as a ratio of gross receipts. One paid .56% of gross revenues in municipal taxes; another paid .51%; and the remainder paid less than .50%. Because USFG paid over 2%, a disparity existed.

In addition to the comparison with specific businesses, USFG presented some overall figures. All property tax which was paid was attributed to nonfire and casualty licensees (an attribution, of course, that is contrary to fact), and the license tax payments were added to that to show that $4,006,811 was paid in taxes on gross receipts of $452,883,554 for a ratio to gross receipts of 0.885%. The same figure for the fire and casualty companies was 2.097%. In license tax alone nonfire and casualty companies had a ratio to gross receipts of 0.176%. The inclusion of the property taxes—in the unrefined way apparently necessary[134]—sharply reduced the disparity against the fire and casualty companies, from over 10 to 1 to about 2.5 to 1.

The master in equity found for the city, the circuit judge affirmed, and the supreme court affirmed pursuant to Rule 23.[135] The meaning of the court's Rule 23 decision may be that a disparity of that dimension is not sufficient to incite inquiry.

VI. CONCLUSION

Recent amendments to the constitution have removed the two specific references to license taxes.[136] There is no indication, however, that the recent amendments were intended to alter the judicial development of the theory of license taxes over the last century.

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134. In a subsequent case, now before the circuit court, *United States Fidelity & Guar. Co. v. Beaufort*, the figures were limited to the property taxes paid only by licensees. All taxes and fees paid by all licensees showed a payment of $270,491 on gross income of $47,813,555, a ratio of less than 0.6%, "less than one-third (⅓) of the license tax levy on fire and casualty." Brief of United States Fidelity & Guar. Co. at 24.

135. S.C. Sup. Ct. R. 23.

136. The reference in S.C. CONST. art. VIII, § 6 (1962) was removed in 1973. 1973 S.C. Acts 67, No. 63. The reference in S.C. CONST. art. X, § 1 (1976) was removed in 1977. 1977 S.C. Acts 90, No. 71.