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BAIL IN SOUTH CAROLINA — THE BAIL ACT OF 1969†

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I. INTRODUCTION

Anglo-American criminal procedure typically calls for an arrest at the outset of the prosecution. The assumption underlying arrest is that pretrial detention may be necessary to secure the defendant's presence at trial, and if it is necessary to assure his presence, it is authorized. A qualifying assumption, which evolved early in the history of English criminal procedure and which is one of the rallying points of freedom in western civilization, is that the accused should not be detained prior to trial if some other less oppressive means of securing his presence is practicable.¹ The practice of setting bail has emerged from this latter assumption.

The chief component of the bail system has become "money bail"—the method by which the defendant is released from pretrial custody only if he is able to post a specified amount of currency or equivalent security, or can obtain a surety to pledge the specified amount. Most observers acknowledge that money bail works unfairly against the lower economic groups, and its efficacy is doubted since the risk of financial loss on the accused is certainly not the primary issue in determining risk of flight. The shortcomings of the bail system are widely known and well documented, and need not be repeated here.²

It is widely assumed that the only recognized valid purpose for imposing bail as a condition to pretrial release is to insure

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1. AMSTERDAM, SEGAL & MILLER, *TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES* § 55 (1967).

2. See, e.g., THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: THE COURTS* 37-41 (1967).

appearance at trial. It is an historical and elementary tenet of Anglo-American jurisprudence that a person should not be incarcerated until proven guilty, and it follows that a person accused of crime should be released pending his trial if he can provide some reasonable assurance that he will not flee the jurisdiction. Most judicial officers frequently go beyond this view of the purpose of bail and set high bail, or deny it altogether, to prevent the release of persons who are thought to be "dangerous." It cannot be denied that society has a legitimate interest in protection against dangerous incorrigibles who might otherwise commit more crimes pending trial.³ However, judicial officers seldom have sufficient data to effectively guide them in the determination of "danger", and often refuse to admit that the amount of bail reflects preventive detention.

Even more serious is the fact that some officials view bail in another light: they see it as a means by which persons who have "clearly" engaged in criminal conduct can receive punishment in addition to that imposed upon conviction. This usage of bail is obviously antithetical to its historical purpose, but it is adopted too often by officials in this and other states.

The development of new methods of pretrial release has begun in most American jurisdictions. The Vera Foundation's Manhattan Bail Project⁴ successfully disproved some of the false premises surrounding bail and provided the model for changes in bail procedures in many communities. The National Conference on Bail and Criminal Justice of 1964 made an in-depth study of the problems in the bail system. The reports from these and other studies of the bail system indicate the desirability of divorcing pretrial release from monetary considerations whenever possible, and various pretrial release experiments have shown that this can be done successfully.⁵ Influenced by these experimental projects, Congress took a new approach in the federal

3. For this reason the Bail Act of 1969 in South Carolina expressly permits the factor of "unreasonable danger to the community" to be taken into consideration in setting conditions of release S. C. CODE ANN. § 17-300 (Supp. 1969).

4. See Ares, Rankin, and Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole*, 38 N.Y.U.L. REV. 67 (1963).

5. In the early 1960's several experimental bail projects such as the Manhattan Bail Project were tried in which qualified defendants were released on bond without surety or simply on a promise to return for trial. The programs worked successfully in New York, Washington, D. C., DesMoines and nearly one hundred other communities. It reduced detention by fifty percent or more, but the default rate for no-bail releases regularly ran below that of the bail bond defendants. Wald and Freed, *The Bail Reform Act of 1966: A Practitioner's Primer*, 52 A.B.A.J. 940 (1966).

system with the Bail Reform Act of 1966.⁶ This legislation stresses release without monetary ties. Several states have followed suit with similar bail reform laws. In South Carolina, a new and potentially far-reaching Bail Act⁷ became law June 18, 1969, and is now applicable to all non-capital bail determinations.

II. RIGHT TO BAIL

The right to pretrial release on bail was explicitly protected by the English Habeas Corpus Act of 1679 and the Bill of Rights of 1688. The legacy of these safeguards is found in the constitutions and statutes of every American jurisdiction.

The eighth amendment to the United States Constitution contains a provision against excessive bail, but no express right to bail is provided. It has been argued that this clause assumes and thus compels an underlying right to bail, but the case law on this point is undeveloped. It has also been argued that the bail provision of the eighth amendment is applicable to the states through the due process clause of the fourteenth amendment because bail is a "fundamental guarantee of individual liberty," but the Supreme Court has not so held.⁸

In South Carolina, article I, § 20 of the Constitution of 1895 guarantees to all persons the right to bail before conviction, except in capital cases where the proof is evident or the presumption great. This phraseology is commonly used in state constitutions throughout the country and simply means that bail is a matter of right in all cases except those in which the offense is punishable by death, and in the latter, bail is a matter of right unless the proof is evident or the presumption of guilt great. The South Carolina court has long held that the granting of bail in capital cases is to be exercised with discretion and should be done with great reserve.⁹

Excessive bail is prohibited by article I, § 19 of the South Carolina Constitution. Except in cases of extreme abuse, the meaning of this prohibition is elusive. It has been said that bail is excessive when it is set at an amount higher than that reasonably calculated to insure that the accused will appear, stand trial, and submit to sentence if convicted.¹⁰ Bail must not be

6. 18 U.S.C. § 3146 (1966).

7. S.C. CODE ANN. §§ 17-300 to -300.9 (Supp. 1969).

8. For a good discussion on the constitutional aspects of bail see Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959 (1965).

9. *State v. Hill*, 5 S.C. (3 Brev.) 89 (1812).

10. *Stack v. Boyle*, 342 U.S. 1 (1951).

more than the accused can reasonably be expected to give under the circumstances.¹¹ If bail is set at a high amount without a proper hearing so that the admitting officer cannot argue that he had information which justified his position, the accused should have an excellent argument that the bail is excessive and should be reduced. Under the Federal Bail Reform Act the accused has the right to know how the commissioner arrived at his decision to set bail, and he may request and secure the commissioner's written reasons for insisting on bail.¹² While the South Carolina Bail Act does not contain such a provision, counsel for the defense should always urge that the judicial officer give reasons for his determinations at the bail hearing.

The excessive bail provisions found in most constitutions in this country are receiving attention today from those who argue that the *ability* of the accused to give bail should be a strong factor in determining the amount of bail. While financial ability is not the controlling circumstance, many courts have stated that the ability of the accused to give bail is a factor to be considered and that a reasonable bond for one man might be excessive for another. The South Carolina Bail Act of 1969 provides that one of the circumstances that should be considered in determining the conditions for release is the financial ability of the accused.¹³ The Act also attempts to abolish the requirement of sureties in most cases.¹⁴ (*See* Section III).

On appeal, bail is a matter of right in those cases where the defendant has been sentenced to ten years or less.¹⁵ When the defendant has been convicted and sentenced to a term exceeding ten years, or sentenced to death, bail on appeal is within the discretion of the supreme court, which will consider the probability of reversal, the nature of the crime, the possibility of escape, and the character and standing of the accused.¹⁶

III. PROCEDURE FOR ADMITTING TO BAIL

A. *Officers Who May Admit to Bail*

Several officers are authorized to admit to bail in South Caro-

11. *Carlisle v. Landon*, 73 S.Ct. 1179 (Douglas, Circuit Justice 1953). *But cf.* *White v. United States*, 330 F.2d. 811 (8th Cir. 1964) where the Court refused to hold that bail, otherwise non-excessive, was excessive when imposed against a person who could not meet that amount.

12. 18 U.S.C. § 3146(d) (1966).

13. S.C. CODE ANN. § 17-300.2 (Supp. 1969).

14. S.C. CODE ANN. § 17-300 (Supp. 1969).

15. S.C. CODE ANN. § 7-8 (1962).

16. S.C. CONST. art. V., § 4. *See also* *State v. Whitener*, 225 S.C. 244, 81 S.E.2d 785 (1954); *Nichols v. Patterson*, 202 S.C. 352, 25 S.E.2d 155 (1943).

lina. Magistrates may grant bail to any person charged with an offense the punishment of which is other than death or life imprisonment.¹⁷ Clerks of court may admit to bail any persons charged with a misdemeanor.¹⁸ County court judges may admit to bail in those cases triable by them.¹⁹ Circuit court judges may admit to bail in all cases and are the only officials, other than justices of the supreme court, who can admit to bail in capital cases. Police officers and sheriffs have no power to release persons on bail, although such officers often do so, frequently with the permission of the local magistrate.

Ordinarily the crime will have been committed within the jurisdiction of the admitting officer, but if the arrest by warrant is made in a county other than that in which the offense is charged, an authorized officer at the place of arrest may set bail.²⁰

The magistrate is the judicial officer who most frequently sets bail in this state. It is estimated that this official handles more than ninety-five percent of all bail proceedings.

B. The Bail Proceeding

In some of the State's urban areas, magistrate-level officers conduct "bail hearings" that are somewhat more elaborate than the usual bail proceedings in other areas of this State. In these areas the judge's chambers or the courtroom is set aside to admit to bail those persons taken into custody since the previous bail hearing. Inquiry is made into the character and criminal record of the accused, and the accused or his attorney is given the privilege of arguing in mitigation of the conditions of release.

In most instances the bail proceeding is nothing so formal or deliberative as that described in the preceding paragraph. More often, the magistrate has the accused brought before him, listens to the charge, and mechanically applies an amount established by a rate schedule to the case. In many instances the defendant is not taken before the magistrate; instead, arrangements are made by telephone whereby the magistrate simply applies his rate schedule to the case without inquiry into the risk of flight. "Jailhouse bail" is common in South Carolina although it is unauthorized. Where this type procedure is found the defendant

17. S.C. CODE ANN. §§ 43-241, -242 (1962).

18. S.C. CODE ANN. § 17-301 (1962).

19. See the various county court acts in Title 15 of the Code of Laws of South Carolina, 1962.

20. *State v. Rabens*, 79 S.C. 542, 60 S.E. 442 (1908).

is released by law enforcement officers or by the jailer without any semblance of a hearing on the key issues of bail.

Whether these practices will be altered by the Bail Act of 1969 remains to be seen. The Act provides that in determining which conditions of release to impose, the admitting officer may take into account the nature and circumstances of the offense charged, family ties of the accused, employment, financial resources, character, mental condition, the length of his residence in the community, his record of conviction, and any record of flight to avoid prosecution or failure to appear at other court proceedings.²¹ Although this act does not require the magistrate or other judicial officer to conduct a bail hearing before imposing conditions and setting the amount,²² it is generally accepted that if bail is a matter of right the accused is entitled to a hearing on his application for release.²³ Counsel should request a bail hearing and a thorough consideration of the factors enumerated above, and at such proceeding he should emphasize those issues most favorable to the immediate release of the accused at the lowest acceptable amount.

C. Forms of Conditional Release

Pursuant to the Bail Act of 1969, section 17-300 provides that any person charged with a non-capital offense must be released pending trial on his own recognizance without surety, unless the officer determines that such release (1) would not reasonably assure the appearance of the accused as required, or (2) would result in an unreasonable danger to the community. (This latter consideration was not included in the Federal Bail Reform Act of 1966; that Act has been criticized for this omission.²⁴)

It is thought by some that this provision was intended to create in South Carolina a form of "release on own recognizance" (R.O.R.) that has been adopted in some other states and in the federal system so that if the accused does not fall within the two exceptions, he need only sign a written promise to attend all proceedings in the case and to remain on good behavior. With such a construction of the word "recognizance", this state would be adopting the position advocated by bail reformers by severing

21. S.C. CODE ANN. § 17-300.2 (Supp. 1969).

22. The language of § 17-300.2 provides only that the officer "may" take these factors into consideration "on the basis of available information."

23. See, e.g., *Heikkinen v. United States*, 208 F.2d 738 (7th Cir. 1953).

24. Wald and Freed, *The Bail Reform Act of 1966: A Practitioner's Primer*, 52 A.B.A.J. 940 (1966).

the issue of pretrial release from the financial state of the defendant.

On the other hand, it has been contended that the word "recognizance" as used in the Act should be construed to mean what it has meant in this state for generations—a bond signed by the accused in a specified amount, although without sureties because of the new provision. Such an interpretation of the term is consistent with its usage in an early form book²⁵ and in Chapter 5 of Title 17 in the South Carolina Code²⁶ on bail and recognizances, and conforms to the definition given it in many other jurisdictions. The Attorney General has adopted this interpretation of recognizance in preparing order forms for admitting officers pursuant to section 17-300.3.

Thus, at present, if a non-capital defendant does not fall within one of the two exceptions, he must be released if he signs an unsecured bond (*i.e.*, recognizance) in the amount specified by the admitting officer. No matter what amount the officer sets, the accused does not have to be actually "worth" that amount in cash or property ownership in order to obtain his release on the recognizance. The amount specified in the recognizance is only an acknowledgement of an indebtedness to the state in the amount specified, which becomes absolute should the accused fail to comply with the conditions set forth.

Unless the admitting officer makes a determination that the defendant falls within one of the two exceptions, no conditions may be imposed on his release except that he should personally appear at subsequent proceedings in the case, should remain on good behavior, and should not depart the state. If the officer attempts to set other conditions, counsel should insist that he give his reasons for his finding that the defendant's release on his own recognizance would not reasonably assure his presence at the proceedings or would result in an unreasonable danger to the community. If no hearing is conducted, as is too frequently the case in many localities, obviously no rational determination of these matters can be made. If the defendant is a resident of the community and is charged with a minor offense, the officer would find it difficult to make a valid determination that the defendant falls within one of the two exceptions. So, although the Bail Act does not explicitly require a hearing, the

25. EARLES, SOUTH CAROLINA FORM BOOK 401 (1911).

26. S.C. CODE ANN. § 17-301 to -316 (1962).

fact that it requires various determinations necessarily assumes, and in fact compels, that an adequate bail hearing be conducted.

If the admitting officer in a non-capital case determines that the defendant's release on his own recognizance would not reasonably assure his appearance as required, or would result in unreasonable danger to the community, the defendant still has his constitutional right to bail, but the officer may impose any one or more of the conditions set forth in section 17-300: (a) require the execution of a bond with good and sufficient sureties; (b) place the person in the custody of a designated person or organization agreeing to supervise him; (c) place restrictions on the travel, association, or place of abode of the person during the period of release; and (d) impose any other condition deemed reasonably necessary to assure appearance, including a condition that the person return to custody after specified hours.²⁷ The purpose of this provision is to provide some leeway in selecting the methods by which the defendant's appearance at trial may be assured. Although there is no guarantee that magistrates will not routinely require a surety bond in every case where a risk of flight is found to exist, counsel should try to prevent this result with arguments that other conditions would suffice. Particularly if the defendant has strong roots in the community and a stable employment and family situation, one of the other forms of release should be used.

If the officer insists on a secured bond, some means of security other than a commercial surety should be used, if possible. For example, the defendant may have friends or relatives who will act as sureties without fee. It is unlawful for the attorney himself to be taken as bail²⁸ although this prohibition is frequently circumvented. The defendant may be permitted to deposit cash or negotiable securities—such as a check²⁹—equal to the amount of the bond. Although there is no statute authorizing the deposit of a real property interest as security for a bail bond, there is no reason why such could not be permitted. If a deposit is made in a case triable in a magistrate's court, it cannot exceed the maximum fine for the offense for which the person is to be tried.³⁰

The deposit of cash or other security, or the services of a friend or relative to act as surety, is least costly to the defendant since the premium paid to a commercial bondsman (at about ten

27. S.C. CODE ANN. § 17-300 (Supp. 1969).

28. S.C. CODE ANN. § 17-305 (1962).

29. *State v. Harrelson*, 211 S.C. 11, 43 S.E.2d 593 (1947).

30. S.C. CODE ANN. § 43-243 (1962).

percent of the face amount of the bond) is not recoverable even if the defendant complies with all the conditions set forth therein.

The Bail Act does not provide for the depositing of securities in lieu of surety as a condition of release, but since this new legislation does not repeal the statutes that permit some of these substitute methods and does not expressly prohibit the methods that are in common usage, it seems that such a deposit may still be made.

In some cases no form of release will be available to the accused except with commercial surety. Professional bondsmen are available in most metropolitan areas in the state, and in other communities there are prominent citizens who provide this service for a fee.

Since the Bail Act does not apply to capital cases, the conditions of release enumerated in section 17-300 are not available to capital offenders; only the forms of release provided in Chapter 5 of Title 17 in the South Carolina Code prior to the 1969 amendments are applicable to such cases. As a practical matter, bond with surety is almost always required.

The defendant in a capital case may be denied bail if the proof of his guilt is evident or the presumption great,³¹ and since bail can be set in such cases only by the circuit court judge or a justice of the supreme court, a bail hearing of some sort is ordinarily conducted to determine these issues and to decide in what amount the bond should be set.

D. Posting Bail

Unless the magistrate determines that a release on recognizance will not reasonably assure the appearance of the defendant or will result in an unreasonable danger to the community, the defendant must be released on his own recognizance without surety.³² In such cases, after the admitting officer sets the amount of bail, the defendant "posts bail" by (1) signing the appearance recognizance whereby he acknowledges an indebtedness to the state which may become absolute upon his failure to comply with the conditions, and (2) acknowledges his understanding of the terms and conditions of his release on a form.

Where the admitting officer determines that the case is embraced within one of the two exceptions, but he is persuaded by

31. S.C. CONST. art. I, § 20.

32. S.C. CODE ANN. § 17-300 (Supp. 1969).

counsel to forego the surety requirement and impose one or more of the conditions listed in paragraphs (b) through (d) of § 17-300, the defendant "posts bail" by signing the proper forms, including an acknowledgement of his understanding of the terms of the conditions of his release, supplied by the admitting officer.

If the admitting officer determines that the case falls within one of the two exceptions and insists upon security for the bond, the defendant must obtain the wherewithal to make up the amount, either by deposit or by surety (as discussed in subsection C, *supra*). If the officer accepts a deposit of cash or securities, the defendant should obtain a receipt. If the defendant is released on a surety bond, "posting bail" consists of the defendant and his surety signing the bond (a form) and obtaining a discharge order. Often the discharge order is a telephone call to the jailer informing him to release the defendant. Where a professional surety is used, the surety usually takes care of the release. It is preferable, however, for counsel to go to the jail to see that the defendant is immediately released from custody and to reiterate to him the conditions and terms of his release.

IV. DURATION OF BAIL

South Carolina practice is to set bail to assure the defendant's appearance at trial, and for this reason new bail is not demanded at other pretrial stages. This does not mean, however, that the recognizance cannot be conditioned on appearance at pretrial hearings. If it is so conditioned and the defendant is given proper notice but fails to appear, the bond may be estreated at that stage.³³ Likewise, where the defendant is released on his own recognizance pursuant to the Bail Act, the court could impose additional or different conditions of release upon the defendant's failure to comply with any of the original conditions such as appearing at all of the pretrial proceedings.³⁴

If the case is not tried at the first term after the defendant is released on bail, he is under an obligation to attend future terms of court until there has been a final disposition of the case. The fact that the defendant's attorney fails to notify him that the case might come up at the next term does not relieve the defendant or his surety of the obligation to appear.³⁵ A final

33. *State v. Williams*, 84 S.C. 21, 65 S.E. 982 (1909).

34. S.C. CODE ANN. § 17-300.4 (Supp. 1969).

35. *State v. Johnson*, 213 S.C. 241, 49 S.E.2d 6 (1948).

disposition is not rendered until an order of discharge is issued by the court at which the party is bound to appear, and thus a finding of no bill by the grand jury or a *nolle prosequi* by the solicitor does not discharge the obligation.³⁶

A bond on appeal requires the defendant to appear in the trial court after the verdict has been reversed and the case remanded for a new trial.³⁷

V. REMEDIES

In some states, review of an adverse bail determination is available by appeal, but South Carolina has no provision permitting appeal from a denial of bail or the setting of excessive bail.

In those states that do not provide appellate review of bail issues, a writ of habeas corpus is allowed. Although there are no cases on point, South Carolina has recognized that habeas corpus is available for the purpose of inquiring into the detention of a person and whether he is entitled to an absolute or conditional discharge.³⁸

A writ of mandamus may issue where an official refuses to perform a ministerial function. Since a bail hearing is needed in capital cases to determine whether the proof is evident or the presumption great and is necessary in non-capital cases in order to make the determinations required by the Bail Act of 1969, it can be argued that a denial of bail without even a hearing can be remedied by writ of mandamus. A writ of mandamus may issue from the circuit court³⁹ or from the supreme court.⁴⁰ But if the officer conducts a hearing and then decides not to grant bail, or decides to set bail in an allegedly excessive amount, mandamus will not lie since the issue in such a case is not whether the officer failed to perform a ministerial act but rather whether he abused his discretionary powers.

When state courts refuse bail, some possible avenues can be pursued in the federal courts. A state court defendant might be able to obtain a writ of habeas corpus in federal district court

36. *State v. Williams*, 84 S.C. 21, 65 S.E. 982 (1909); *Whaley v. Lawton*, 57 S.C. 256, 35 S.E. 558 (1900).

37. *Mayesville v. McCutchen*, 205 S.C. 241, 31 S.E.2d 390 (1944).

38. *State v. Farris*, 51 S.C. 176, 28 S.E. 308 (1897). See also 39 C.J.S. *Habeas Corpus* § 34 (1944). For the procedure of filing for a writ of habeas corpus in South Carolina, see S.C. CODE ANN. § 17-351 *et. seq.* (1962).

39. S.C. CONST. art. V, § 15.

40. S.C. CONST. art. V, § 4.

on the theory that he has a substantial federal claim because of the deprivation of his federal constitutional right to bail pending trial. Although many authorities expect that the United States Supreme Court will soon apply the eighth amendment's prohibition against excessive bail to the states, and might even announce that denial of bail in some cases violates due process, there are no decisions to this effect at the moment. The exhaustion⁴¹ doctrine, which provides that state remedies must be exhausted before a federal writ can be obtained, is not applicable if the state courts have made a final, non-appealable ruling on the issue. Where the circumstances are such that obtaining an express denial of bail is difficult, the defendant may be able to file the federal habeas corpus petition without exhausting state remedies on the theory that the state has failed to provide adequate remedies.⁴²

The defendant may file a petition for a writ of certiorari from the state court's adverse decision, treating the denial of bail or the excessive bail as a final state judgment for the purpose 28 United States Code § 1257 where no state appellate process is available. Obviously there would be a lengthy waiting period before the United States Supreme Court acted.

VI. DEFAULT

If the defendant defaults on his bond or otherwise violates the terms of his release, the bond may be forfeited by a rule to show cause why the instrument should not be estreated.⁴³ The show cause procedure seems to be the statutory replacement of the old common law writ of *scire facias*.⁴⁴ The proceeding to estreat the bond is instituted in the circuit court by the solicitor.⁴⁵

Complex contractual rights and obligations are created by the bail bond, especially if a surety is involved. Suffice it to say that the instrument evidences an obligation of record which becomes absolute if the defendant fails to comply with the conditions set forth therein. The state must show that the condition was violated, but such a showing may be made by use of extrinsic

41. 28 U.S.C. § 22,54.

42. See, e.g., *In re Shuttleworth*, 369 U.S. 35 (1962).

43. S.C.CODE ANN. § 17-311 (1962).

44. See *State v. Wilder*, 13 S.C. 344 (1880), where the writ of *scire facias* was used.

45. *State v. Bailey*, 248 S.C. 438, 151 S.E.2d 87 (1966).

evidence.⁴⁶ For instance if the condition of the bond was that the defendant appear at trial, the solicitor must show that he was given proper notice, that he was regularly called, and that he failed to appear.

Because a contractual relation is involved, estreat is subject to estoppel. Thus, in *State v. Simring*⁴⁷ the state was estopped because it had waived its right to require the appearance of the defendant when the prosecution permitted the defendant's attorney to appear without the defendant and to consent to a verdict of guilty.

If the defendant fails to appear at the time scheduled for the proceeding in his case, he is not relieved of liability by a belated appearance after he is subsequently apprehended.⁴⁸

In addition to forfeiture, the defendant may be subject to prosecution for a separate and distinct offense if he willfully fails to appear.⁴⁹

46. *State v. Cornell*, 70 S.C. 409, 50 S.E. 22 (1905).

47. 230 S.C. 49, 94 S.E.2d 9 (1956).

48. *State v. Bailey*, 248 S.C. 438, 151 S.E.2d 87 (1966).

49. S.C. CODE ANN. § 17-300.8 (Supp. 1969).