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LEGISLATION

I. INTRODUCTION

This survey covers selected acts passed between April 1, 1972, and July 28, 1972, which are of primary importance to members of the legal profession. New and repealed statutes affecting criminal law, workmen's compensation, contracts, and commercial transactions are discussed, but primary emphasis is placed upon three major legislative acts. Two of these acts, one providing for the reapportionment of the Senate of South Carolina[1] and the other creating a new claim and delivery procedure,[2] were enacted in response to standards set by the United States Supreme Court. The degree to which the acts comply with those standards will be analyzed. The third major act deals with public access to information from governmental agencies.

II. THE FREEDOM OF INFORMATION ACT

The Freedom of Information Act[3] is unprecedented legislation in South Carolina. Its ultimate impact, however, will depend upon the judicial interpretation given to the exceptions within it. The Act provides that all records and meetings of public agencies shall be open and accessible to the public and empowers the courts to grant injunctive relief to any citizen desiring to enforce its provisions.[4] The agencies deemed "public" by the Act include all organizations, corporations, and agencies that are supported in whole or in part by public funds, or that expend public funds. The Act also lists every department of state, state board, commission, authority, political subdivision, or quasi-governmental body of the state as a public agency.[5]

Despite the broad scope of the Act, the extent of its actual application is rendered uncertain by two equivocal exceptions. Although the Act affords the public the general right to attend all meetings of public agencies, a meeting designated an "executive session" can be closed to the public.[6] Moreover, while the Act

1. S.C. CODE ANN. § 30-4.4 (Supp. 1972).
2. *Id.* §§ 10-2504, -2505, -2507 to -2507.5, *and* 43-173, -175, -181, -185 to -188.
3. *Id.* § 1-20.
4. *Id.* at § 1-20.4.
5. *Id.* § 1-20.1.
6. *Id.* § 1-20.3.

generally makes records of governmental agencies accessible, it allows officials to withhold records when the public interest is said to be best served by nondisclosure.[7]

These exceptions raise two threshold questions: First, when executive sessions are held, who is to provide assurance that what has occurred should not have been open to the public? Second, who determines whether nondisclosure of recorded information serves the public interest?

A recent opinion of the South Carolina Attorney General was addressed to the second question.[8] According to the opinion the agency itself should initially decide whether disclosure would adversely affect the public interest. If an exception is taken to this decision, the agency must satisfy a court in an injunctive proceeding authorized by the Act that nondisclosure benefits the public. Following a similar procedure to determine when an agency can properly meet in executive session would seem to be a viable approach consistent with the intent and spirit of the Act.[9]

III. REAPPORTIONMENT

In 1972 the General Assembly passed two different plans to reapportion the Senate of South Carolina.[10] The reasons for two disparate plans within one act are evident in light of the facts precipitating its passage.

The 1971 reconvened session of the General Assembly passed an act including a plan for the reapportionment of the State Senate.[11] Because of the approaching 1972 general election, the Senate directed the Attorney General to institute an action to determine the validity of the reapportionment plan.[12] As a result of this action, a three judge federal court in *Twiggs v. West*[13] declared the plan invalid under the equal protection clause of the fourteenth amendment[14] and granted the General Assembly thirty days to enact a plan within guidelines specified by the court.

7. *Id.* § 1-20.1.
8. [1972] S.C. REP. ATT'Y GEN. 187 (No. 3348).
9. *See* No. 1396, § 2, [1972] S.C. Acts & Jt. Res. 2585.
10. S.C. CODE ANN. § 30-4.4 (Supp. 1972).
11. No. 932, [1971] S.C. Acts & Jt. Res. 2071.
12. No. 1205, § 1(5), [1972] S.C. Acts & Jt. Res. 2384.
13. Twiggs v. West, Civil No. 71-1106 (D.S.C. Apr. 7, 1972).
14. U.S. CONST. amend. XIV, § 1.

The demise of the 1971 reapportionment plan can be traced to several United States Supreme Court decisions. In *Reynolds v. Sims*[15] the Court stated that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. In more recent decisions[16] the Court has qualified *Reynolds* by acknowledging that rational state policies may be served by allowing substantially less than equal representation. The Court also considers a state's good faith, or lack thereof, in attempting to comply with the one man, one vote requirement within the framework of its policy objectives. These factors are then balanced against the extent of a reapportionment plan's total variance[17] from mathematically equal representation.

This balancing test was applied in *Abate v. Mundt,*[18] where the Supreme Court gave effect to a state policy maintaining the integrity of political subdivisions and thereby permitted a maximum variance of 11.9 percent. In *Wells v. Rockefeller,*[19] however, maintenance of existing county lines was held to be insufficient justification for a congressional reapportionment that resulted in a 12.1 percent variance. Mr. Justice White, dissenting in *Wells* and *Kirkpatrick v. Preisler,*[20] stated that as a general rule a total variance between the largest and smallest district of no more than 10 to 15 percent should be satisfactory.

Relying on these decisions, the court in *Twiggs* held that South Carolina's purported policy of maintaining then existing senatorial districts as a deterrent to gerrymandering could not justify a total variance of 19 to 24 percent. This decision is reinforced by *Mahan v. Howell,*[21] in which the Supreme Court recently stated that a total variance of 16 percent may approach acceptable limits. *Mahan* also stressed the distinction between congressional redistricting and state legislative reapportionment:

15. 377 U.S. 533 (1964).

16. Abate v. Mundt, 403 U.S. 182 (1971); Wells v. Rockefeller, 394 U.S. 542 (1969); Kirkpatrick v. Preisler, 394 U.S. 526 (1969).

17. Total variance is computed by dividing the number of legislators into the total population, thereby finding the average number of individuals each legislator should represent. The degree of deviation from this norm of the most overrepresented district is then added to the deviation from the norm of the most underrepresented district. The resulting number is the reapportionment plan's total variance.

18. 403 U.S. 182 (1971).

19. 394 U.S. 542 (1969).

20. 394 U.S. 526, 553 (1969).

21. 93 S.Ct. 979 (1973).

A state objective of preserving the integrity of political subdivisions is of greater force in a state legislative reapportionment because it furthers the legislative purpose of facilitating enactment of statutes of purely local concern and thus preserves for voters in political subdivisions a voice in the state legislature on local matters. As a result, when a good faith attempt to redistrict is found in a state legislative reapportionment, greater flexibility in total variance will be permitted than in a congressional redistricting. Nevertheless, South Carolina's 1971 plan clearly exceeded the limits set forth in *Mahan*.

In response to the *Twiggs* decision, the South Carolina Senate adopted the present plan with a total variance of 9.93 percent, and the House of Representatives amended the plan and submitted another with a potential variance of 9.3 to 12.37 percent. A conference committee failed to agree on either plan, and, rather than default in the matter, the General Assembly enacted both plans with the expectation that the federal court would find that one complied with its guidelines.[22] The plan that originated in the Senate was accepted,[23] and the general election of 1972 was conducted in accordance with it.*

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22. *See* S.C. CODE ANN. § 30-4.4 (Supp. 1972).

23. Twiggs v. West, Civil No. 71-1123 (D.S.C. May 23, 1972). In Twiggs v. West, Civil No. 71-1211 (D.S.C. Jun. 9, 1972), the court refused to vacate its May 23, 1972, decision approving the Senate plan. This decision was appealed to the United States Supreme Court on the grounds that it was a denial of due process to approve the plan without hearing any argument. The Supreme Court has since affirmed the June 9, 1972 district court order. Powell v. West, 41 U.S.L.W. 3671 (U.S. June 25, 1973) (No. 72-452).

*[*Editor's Note*: The validity of the Senate reapportionment plan was, of course, clouded by Harper v. Richardson, Civil No. 1607-72 (D.D.C. 1973). In *Harper* the United Citizens Party sued in the District Court for the District of Columbia and compelled the Department of Justice to interpose an official objection to the plan pursuant to section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1970). Although the Department had made a specific finding that the plan discriminated against blacks, it felt constrained to defer to the decision of the three judge panel upholding the plan in Twiggs v. West, Civil Nos. 71-1106, 71-1123, 71-1211 (D.S.C. 1972). The district court in *Harper*, however, apparently reasoned that the plan's constitutional validity under the *Reynolds* doctrine was not dispositive of its validity under the Voting Rights Act. The court held that the Department's allowing the statutory period for objecting to elapse did not constitute approval of the plan because section 5 imposes on the Department an affirmative duty to object that cannot be ignored. The Department has appealed.

It should also be noted that the House reapportionment was declared invalid by the United States Supreme Court in Stevenson v. West, 41 U.S.L.W. 3671 (U.S. June 25, 1973). This decision is discussed in the *1973 Survey of South Carolina Legislation*, 25 S.C.L. REV. ___ (1973), which will be published in October.]

IV. CONTRACTS

Several significant new statutes concern the contractual assent of a minor. One provision grants a minor over the age of sixteen the authority to consent to all health services except those involving operations that might jeopardize his life.[24] This law makes the further consent of an adult unnecessary. Moreover, consent given by a minor for health services is not subject to disavowal because of infancy after the minor reaches legal age.[25]

A recent opinion of the South Carolina Attorney General interpreting this statute addressed itself to the question of whether a minor sixteen years or older may procure birth control pills without the consent of her parents.[26] The opinion stated that "health services" as used in the statute include those services reasonably associated with the preservation, maintenance, or restoration of psychological and physical well being. Birth control pills, apart from their primary use, serve to regulate body functions and reduce physical pain. Dispensation of the pills is therefore a "health service" that may be sought by minors without parental permission.

A statute that severely restricted a minor's power to contract in South Carolina was repealed.[27] This law had rendered null and void any contract for the purchase of merchandise or articles of trade entered into by a minor college undergraduate. The minor was not even allowed to confirm the contract when he reached legal age. The repeal of this statute will obviously increase the credit available to students.

V. CRIMINAL LAW

An interesting change in the state's criminal law is the amendment to section 16-383.2 of the South Carolina Code. Before amendment the statute classified as a misdemeanor the communication of a threat to damage any public building or private residence with explosives.[28] The amendment to the statute changed the commission of this act to a felony, and also classified

24. S.C. CODE ANN. § 32-565 (Supp. 1972).
25. *Id.* § 32-568.
26. [1972] S.C. REP. ATT'Y GEN. 213 (No. 3364).
27. No. 1298, [1972] S.C. Acts & Jt. Res. 2487.
28. No. 651, [1960] S.C. Acts & Jt. Res. 1602.

as a felony the act of communicating a threat to kill or intimidate.[29]

The conduct this statute punishes as a felony is the mere verbalizing of an inchoate intent to commit a crime. Thus the statute departs from the common law principle that a threat to commit a crime is not a crime and that violence must actually be offered before an individual can be subjected to punishment.[30] The basis of this principle is that a threat of future violence is not a battery. Nor is it an assault, for such a threat is neither an attempt to commit a battery nor an act of placing another in apprehension of receiving an immediate battery.[31] Thus, by departing from the common law in an effort to deter a disruptive form of conduct, the General Assembly has authorized the imposition of criminal sanctions upon an individual prior to the time he may actually decide to commit a crime.

Among the anachronistic and unconstitutional criminal laws that have been repealed are two that concern marriage. Members of the Caucasion race may now marry members of the Indian or Negro races without transgressing South Carolina law.[32] Secondly, individuals performing such a ceremony are no longer subject to criminal prosecution.[33]

Important regulatory legislation enacted in 1972 is the Polygraph Examiners Act.[34] The purpose of the Act is to establish standards for all persons who profess to be skilled in using instruments to detect deception or verify statements. The Act not only requires that individuals administering the polygraph be licensed but also establishes minimum specifications for the instruments that may be used.

VI. WORKMEN'S COMPENSATION

In 1972 the General Assembly enacted a provision enlarging the number of employers to whom the South Carolina Workmen's Compensation Law[35] applies. Formerly, an employer having less

29. S.C. CODE ANN. § 16-383.2 (Supp. 1972).
30. R. PERKINS, CRIMINAL LAW 132 (2d ed. 1969).
31. *Id.*
32. No. 1198, [1972] S.C. Acts & Jt. Res. 2378, *repealing* No. 5, [1879] S.C. Acts 3.
33. No. 1199, [1972] S.C. Acts & Jt. Res. 2379, *repealing* No. 5, [1879] S.C. Acts 3.
34. S.C. CODE ANN. § 56-1543.51 (Supp. 1972).
35. *Id.* §§ 72-1 to -504 (1962), *as amended.*

than fifteen employees did not come within the Law.[36] Now the Law applies to any employer who has six or more regular employees,[37] and thus affords benefits to many more workers.

Other revisions extend workmen's compensation coverage to inmates of the South Carolina Department of Corrections who participate in vocational training programs[38] and increase the monetary benefits for totally or partially disabled employees.[39] A further change augments an individual's maximum compensation substantially from $12,500 to $25,000.[40]

VII. CLAIM AND DELIVERY

One of the most controversial areas of the law today concerns the respective rights of a secured party[41] and a debtor after the debtor's default on a conditional or installment sales agreement. Section 10.9-503 of the South Carolina Code[42] gives the secured party the immediate right to collateral in the defaulting debtor's possession. This "self-help" remedy is available without judicial process provided the secured party can recover the collateral without breaching the peace.[43]

The secured party can also elect to pursue his right to acquire the collateral through the claim and delivery procedure.[44] The

36. No. 201, [1936] S.C. Acts & Jt. Res. 1231.

37. S.C. CODE ANN. § 72-107(2) (Supp. 1972).

38. *Id.* § 72-11.1 (Supp. 1972).

39. *Id.* §§ 72-151, -152.

40. *Id.* § 72-160.

41. S.C. CODE ANN. § 10.9-105(i) (Spec. Supp. 1966) defines a secured party as a lender, seller, or other person in whose favor there is a security interest. Section 10.1-201(37) states that a security interest is an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer is limited in effect to a reservation of a security interest.

42. S.C. CODE ANN. § 10.9-503 (Spec. Supp. 1966).

43. Thompson v. Ford Motor Credit Co., 324 F. Supp. 108 (D.S.C. 1971). The constitutionality of a secured party's immediate right to possession of the collateral was attacked in Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972). The court in *Oller* held that a private act taken by a private organization to protect its security interest in personal property was not "state action" that would result in a deprivation of property without due process of law. In direct conflict with *Oller* is the holding in Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972). *Adams* stated that the self-help remedy, even if created by a signed security agreement, is a right created under the authority of state law, and use of the remedy constitutes state action violating due process. The United States Supreme Court has not yet rendered a decision on the constitutionality of the self help remedy.

44. S.C. CODE ANN. §§ 10-2504, -2505, -2507 to -2507.5, *and* 43-173, -175, -181, -185 to -188 (Supp. 1972).

state's former procedure[45] accorded the secured party, upon swearing out an affidavit and posting bond, the right to immediate possession of the collateral. The county sheriff was authorized to seize collateral in the debtor's possession without affording him prior notice or an opportunity to be heard. In *Fuentes v. Shevin,*[46] however, the United States Supreme Court held similar state prejudgment replevin statutes invalid under the due process clause of the fourteenth amendment.[47] Procedural due process requires an opportunity for a hearing before the state authorizes its agents, upon the mere application of another, to seize property in the possession of a debtor. "[W]hen a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented."[48]

In attempting to meet the requirements of *Fuentes,* the General Assembly completely revised the state's claim and delivery procedure.[49] A major provision in the new statutes permits the defaulting debtor to demand a pre-seizure hearing within five days after service of the secured party's affidavit.[50] However, the right to a pre-seizure hearing is not absolute for the secured party and the debtor may provide in their contract for a waiver of the hearing.[51] Furthermore, if the secured party satisfies a magistrate upon his *ex parte* affidavit that the property secured is in immediate danger of being concealed or destroyed, the magistrate can order the property seized without prior notice to the debtor.[52]

Whether these statutes comply with the Supreme Court's standards is uncertain. *Fuentes* indicates that a prejudgment replevin statute may be upheld if it serves important governmental or public interests.[53] Permitting a secured party to repossess collateral in immediate danger of destruction or concealment could conceivably be such an interest. To be valid, however, replevin statutes must be narrowly drawn, providing specifically for the

45. *Id.* §§ 10-2501 to -2516 (1962).

46. 407 U.S. 67, 92 S.Ct. 1983 (1972). *See also* Survey of S.C. Constitutional Law *infra.*

47. U.S. CONST. amend. XIV, § 1.

48. 92 S.Ct. at 1994.

49. S.C. CODE ANN. §§ 10-2504, -2505, -2507 to -2507.5 (Supp. 1972).

50. *Id.* § 10-2504.

51. *Id.* § 10-2507.2.

52. *Id.* § 10-2507.4.

53. 92 S.Ct. at 2000.

existence of unusual conditions prior to seizure without notice.[54]

The South Carolina statutes also may conflict with *Fuentes* because they place the burden of requesting a hearing on the debtor instead of requiring that a hearing be held. Moreover, the statutes limit the time during which the debtor may assert his constitutional right to five days.[55]

Finally, the new claim and delivery statutes are vulnerable because they allow a contract to include a provision waiving the debtor's right to a pre-seizure hearing.[56] To enforce a waiver and obtain the right to immediate possession of the property, the creditor need only present the waiver provision to a judge or clerk of court. Because no hearing is held, the debtor has no opportunity to assert that the waiver was involuntary or even that his signature was forged. *Overmyer v. Frick,* cited in *Fuentes,* outlines the relevant considerations in determining whether there has been a voluntary, intelligent, and knowing waiver of due process rights.[57] Important factors are equal bargaining power and the receipt of something in return for the waiver—two conditions not often present in consumer transactions. Thus, section 10-2507.2 of the Code[58] purports to allow a secured party to simply revise his conditional sales contracts to include a standardized waiver provision and thereby avoid a hearing. The General Assembly apparently has advanced the concept of freedom of contract at the expense of the consumer's right to procedural due process.

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54. *Id.*
55. S.C. CODE ANN. § 10-2504 (Supp. 1972).
56. *Id.* § 10-2507.2.
57. 92 S.Ct. at 2001.
58. S.C. CODE ANN. § 10-2507.2 (Supp. 1972).