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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

March 14, 1997

The Honorable James E. Bryan, Jr.
Senator, District No. 9
Box 756
Laurens, South Carolina 29360

Re: Informal Opinion

Dear Senator Bryan:

You have asked several questions regarding debtor-creditor relations. Your issues are as follows:

> 1. Does a magistrate have the authority to set up a payment schedule for a debt when a judgment is secured against the debtor and if so, what can the creditor do if the debtor does not comply with the magistrate's instruction?
>
> 2. If a debtor has pledged collateral for security and the creditor goes to repossess the collateral and the debtor has disposed of the collateral, can a magistrate show a warrant for disposing of property under lien?
>
> 3. What are the procedures for taking a Claim and Delivery Action and their time procedures. What is the fee for Claim and Delivery?

I will address each of these questions in turn.

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1. Does a magistrate have the authority to set up a payment schedule for a debt when a judgment is secured against the debtor and, if so, what can the creditor do if the debtor does not comply with the magistrate's instruction?

Law / Analysis

In Op. Atty. Gen., Op. No. 79-80 (June 12, 1979), this Office found that "[t]here is no express statutory authorization for magistrates to issue executions on judgments rendered in their courts." However, we also concluded that such authority "can be inferred from a review of conflicting statutory provisions." Our analysis consisted of the following:

> Section 22-3-310 of the 1973 Code of Laws states in part that:
>
> > (e)xecution may be issued on a judgment heretofore or hereafter rendered in a magistrate's court at any time within three years after the rendition thereof and shall be returnable sixty days from its date.
>
> The above provision found in the chapter relating to magistrates' courts is in conflict with Section 15-39-20 of the 1976 Code of Laws which provides that parties in whose favor judgments are given may at any time within ten years after the judgment is entered proceed to enforce the judgment.
>
> As to any question of conflict between the two sections, such may be resolved by a determination that Sections 15-39-20 applies only to those judgments issued in magistrate's court which have been filed and docketed with the clerk of the circuit court pursuant to Sections 22-3-300 and 22-3-320 of the 1976 Code of Laws while Section 22-3-310 applies to judgments rendered in a magistrate's court where it is intended that a magistrate issue the execution. However, as stated, if a judgment is docketed in the circuit court, then execution would issue from that court and not by the magistrate.
>
> With reference to the above, it appears evident that magistrates do in fact have jurisdiction to enforce judgments rendered in their courts pursuant to Section 22-3-310. Further

> evidence of the authority of a magistrate to issue execution on a judgment is found in Section 22-7-10 (11) of the 1976 Code of Laws which provides for a fee for a magistrate for issuing an execution.
>
> As to your question of whether the provisions of Section 15-39-10 et seq. of the 1976 Code of Laws pertaining to executions are applicable to a magistrate's court, as was indicated above, a review of such sections reveals a conflict in those sections and the sections specifically applicable only to judgments documented with the circuit court.

With respect to a magistrate setting a payment schedule in lieu of the statutory execution procedures authorized by Section 22-3-310, I would advise against he use of such a payment schedule unless such is agreed to by the creditor. In Bonelli v. Mostyn, 20 Conn. Supp. 390, 136 A.2d 807 (1957), the court concluded that a summary court did not have authority to delay the execution of a judgment. There, the Court stated:

> [a] litigant who has procured a judgment or decree is entitled to have the same enforced, and the court may not rightly refuse proper writs or orders to secure such result. Its duty in the matter is generally of a ministerial character involving no exercise of judgment or discretion and, as such, may be enforced by mandamus. 35 Am.Jur. 49, § 289; Alcorn v. Fellows, 102 Conn. 22, 33, 127 A. 911. Summary process is a purely statutory proceeding, and the statutes relating to the process do not provide for a stay of execution except under the conditions mentioned earlier. These conditions are not existent here, and for the City Court to even entertain the motion to stay and for the clerk to refuse to issue the execution on the court's judgment ... is to exercise a nonexisting power. Such refusal flies in the face of clearly defined law.

136 A.2d at 808.

Moreover, this Office has recognized repeatedly that a magistrate's court is a court of limited jurisdiction and possesses no equity powers. See, Ops. Atty. Gen., October 21, 1987; January 12, 1979; January 14, 1980. See also, Op. Atty. Gen., July 30, 1968; Op. Atty. Gen., September 24, 1981 ["Magistrate's Court is not a Court of record and is a

court of limited jurisdiction."]. In Op. Atty. Gen., Op.No. 2762 (November 13, 1969), we stated that "[i]t was early held that magistrates, then known as trial justices, possessed no inherent power to correct injustices, their prerogatives being only those provided by statute." Furthermore, in Doty and Co. v. Duvall, 19, S.C. 143 (1882), our Supreme Court held that a trial justice's court has no jurisdiction of a motion for a new trial unless a motion is made within five days from the rendering of judgment. The Court stated that

> [a] judgment, regularly obtained and entered of record, should not be set aside without good cause, according to the established practice, based upon clear and full authority. The framers of the code thought it necessary to declare and define by statute the right to relieve a party from judgment taken against him through his excusable neglect, even as to the Court of Common Pleas, which has general jurisdiction; and we cannot hold that a trial justice's court, being of inferior and limited jurisdiction, has such inherent power, without limit of time, as to all cases within its jurisdiction in amount, merely as an incident to the right given by statute to hear and determine them in the first instance.

Id. at 145 (emphasis added). I am not aware of any statute which would authorize a magistrate to delay implementation of an execution of a judgment sought in his court in favor of a payment schedule. By contrast, our Court has indeed stressed that courts of general jurisdiction have inherent power to vacate or set aside their judgments. Peagler v. Atl. Coast Line R.R. Co., 232 S.C. 274, 101 S.E.2d 821 (1958). Moreover, a court of general jurisdiction has inherent power to control its own orders and judgments during the term at which they are rendered and in exercise of sound discretion, it may vacate or modify them. 30 Am.Jr.2d, Executions, Etc., §16. Furthermore, a court of equity or chancery controls its own judgments and has inherent power to enforce its decrees, to control the manner of its execution and to modify by a subsequent order, the manner in which it shall be enforced. Id. at §12.

In view of the fact, however, that a magistrate's court is a court of limited, rather than general jurisdiction, and has no equity powers, my opinion is that, absent a statute specifically authorizing the magistrate to impose a payment schedule, it is very questionable whether a magistrate would possess the authority to delay the execution of a judgement in favor of such a schedule.

Of course, the creditor himself may agree to delay execution. It is well-recognized that an

> ... execution creditor may recall a writ of execution at any time prior to a sale thereunder, and may issue as many writs as he pleases, and stay them as long as he pleases, so long as there are no intervening writs.

33 C.J.S., Executions, §146. Moreover, a valid agreement not to issue or enforce an execution may be made. Id., §17. Thus, if the creditor chooses to agree not to pursue an execution of judgement and to accept instead periodic payments of the debt owed pursuant to a payment schedule, the magistrate may render such schedule with the express consent of the creditor.

2. If a debtor has pledged collateral for security, and the creditor goes to repossess the collateral, and the debtor has disposed of the collateral, can the magistrate show a warrant for disposing of property under lien?

There are at lest two criminal statutes which deal with the disposition of property under lien. The first, S.C. Code Ann. Section 29-1-30, provides as follows:

> [a]ny person who shall wilfully and knowingly sell and convey any real or personal property on which any lien exists without first giving notice of such lien to the purchaser of such real or personal property shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be imprisoned for a term of not less than ten days nor more than three years and be fined not less than ten dollars nor more than five thousand dollars, either or both in the discretion of the court. But the penalties enumerated in this section shall not apply to public officers in the discharge of their official duties. When the value of such property is less than fifty dollars the offense may be triable in the magistrate's court and the punishment shall be not more than is permitted by law without presentment or indictment of the grand jury. When the case is within the jurisdiction of the magistrate's court, the court of general sessions shall have concurrent jurisdiction with the magistrate's court. (emphasis added).

In State v. Johnson, 20 S.C. 387 (19884), the Supreme Court of South Carolina said the following in interpreting this particular statute:

> [t]he manifest object of this act is to prevent intentional fraud or deceit in the sale of property by the suppression of facts which it would be important for a purchaser to know before the sale is completed. The words of the statute are "willfully and knowingly," hence if the act intended to be prohibited is done unintentionally, or ignorantly, the offense created by the statute is not complete. A man may sell and convey property to another which is covered by a lien, of which he gives no notice to the purchaser, and yet, unless he does so willfully and knowingly, he has not violated the statute in question. Keeping this view of the statute in mind, let us consider whether there was any error in refusing the first request to change. That request substantially amounted to this, that if the jury believe that the defendant was ignorant of the fact that the Jordan judgment was a lien upon the land when he made the sale to Buzbee, and at the same time gave him notice that he would arrange to pay the liens -- mortgages -- which he himself had put upon the land, then the defendant must be acquitted.
>
> We think there was error in refusing this request, for if the defendant ignorantly, that therefore unintentionally, made the sale without mentioning the lien of the Jordan judgment, it certainly could not be said that he did so knowingly and willfully, and hence could not be convicted on account of that lien. And if he also brought to the attention of the purchaser the fact that he himself had put certain liens upon the land, by saying "that he would arrange to meet or pay such matters as he (the defendant) had put upon the land," it could not be properly said that he had sold the land without first giving notice of such liens as he had himself put upon the land, to wit, the mortgages. The statute, it would be observed, does not prescribe the degree or kind of notice to be given, and hence we must resort to the general rule upon the subject, and that is, that such notice as will put a party upon inquiry is sufficient notice of every fact which such inquiry, properly prosecuted, would disclose. Now, if a purchaser is told by his vendor that he has arranged or will arrange "to meet or pay such matters as he had put upon the land" which is subject of negotiation, he surely has such notice as would put him upon

> inquiry, for what else can such language mean but that the vendor had put incumbrances of some kind upon the land which he expected to remove?

Thus, the Court has emphasized the importance of the words "willfully and knowingly" in this statute. For the statute to be applicable, the defendant must know that the property in question is under lien and willfully dispose of such without "first giving notice of such lien to the purchaser of such real or personal property." The notice which must be given must simply be sufficient to "put a party upon inquiry ...." Of course, the applicability of any criminal statute depends upon the unique facts involved; however, in the situation you mention, such statute could be applicable where the conduct is "knowingly and willfully" as outlined in the Johnson case.

The second relevant statute in this area is found at Section 36-9-319 and relates to the sale of secured property without consent. Such provision states:

> [n]otwithstanding Section 36-9-311, any person who sells or disposes of any personal property subject to a security interest, except for personal property titled by the Department of Public Safety or the Natural Resources Enforcement Division of the South Carolina Department of Natural Resources, without the written consent of the secured party, and fails to pay the debt secured by the security interests within ten days after sale or disposal or fails in this time to deposit the amount of the debt with the clerk of the court of common pleas for the county in which the secured party resides is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned for not more than one year, or both. This section does not apply when the sale is made without knowledge or notice of the security interest by the person selling the property. When the value of the property is less than two thousand five hundred dollars, the offense is triable in the magistrate's court and the punishment must be not more than is permitted by law without presentment or indictment by the grand jury. Otherwise the offense is triable in the court of general sessions. (emphasis added)

The key elements of this offense are the (1) sale or disposal of personal property (2) which is subject to a security interest (3) without written consent of the secured party

and (4) the accused fails to pay the debt within 10 days after sale or disposal or fails within 10 days to deposit the amount of the debt with the clerk of court of the county in which the secured party resides. The principal defense is, again (as with § 29-1-30), lack of knowledge of the security interest.

The purpose of a statute such as § 36-9-319 is to protect the secured party from an unauthorized disposal of collateral. State v. Jones, 748 P.2d 839 (Kan. 1988); State v. Woodward, 675 P.2d 1007 (N.M. 1983). Such a statute does not require perfection of a security interest, but merely a meeting of the elements outlined above. Again, the applicability of this statute would depend upon the facts, but if the necessary elements are met, a warrant for a violation of this statute would issue.

3. What are the procedures for taking a Claim and Delivery Action and their time procedures. What is the fee for Claim and Delivery?

The action of claim and delivery "is an action for the recovery of specific personal property wrongfully taken or withheld from its rightful owner, with recovery of any damages resulting from the taking or possession of property." South Carolina Bench Book for Magistrates and Municipal Court Judges, II-59. This statutory action is but a modification of the common law remedy of replevin and is merely a substitute therefor. 77 C.J.S., Replevin § 3. Actions of claim and delivery may be used to recover ownership in personal property, not real property, and are proper in the magistrate's court so long as the value of the property to be regained "does not exceed the magistrate's jurisdictional amount ($5,000)." Bench Book, Id. The primary relief sought in claim and delivery is return of the personalty. It is a remedy which may be invoked where a secured creditor seeks to repossess property upon default in installment contract payments. 77 C.J.S., Replevin, Id. at § 5.

Our Court of Appeals has stated that when "the debtor defaults under the terms of a security agreement, the secured party has the right to take possession of the collateral. This right is enforceable against a transferee of the property by judicial action including replevin and claim and delivery." Nat. Bank v. Daniels, 283 S.C. 438, 322 S.E.2d 687 (Ct. App. 1984). Only where the property is not recoverable, or recoverable in a state of repair or substantial value, may the value itself be awarded or recovered. Id.; Reynolds v. Philips, 72 S.C. 32, 51 S.E. 523, 524 (1905).

The claim and delivery statute is set forth at § 22-3-1310 et seq. Section 22-3-1320 first requires an affidavit by the plaintiff showing the following facts:

1. ownership or entitlement to possession;

2. property is wrongfully withheld or detained by defendant;

3. cause for detention by defendant to the best of plaintiff's knowledge;

4. that such property has not been taken for taxes, etc., pursuant to statute or seized by virtue of an execution or attachment, or if so seized is exempt therefrom.

5. actual value of the property.

Section 22-3-1330 sets forth a procedure for the issuance of a summons and notice of right to preseizure hearing following the filing of the affidavit. The notice serves to notify the defendant that "within five days from service thereof, he may demand such hearing and present such evidence touching upon the probable validity of the plaintiff's claim for immediate possession and defendants right to continue in possession ..." The statute further provides that if the defendant fails to appear at the time and place mentioned, the "plaintiff will have judgment for the possession of the property described in the affidavit with the costs and disbursements of the action." Section 22-3-1350 provides for the preseizure hearing. Section 22-3-1360 enables the defendant to waive the preseizure hearing where such is voluntarily, knowingly and intelligently made. Pursuant to Section 22-3-1370, the magistrate is authorized to issue an order restraining the defendant from demanding, concealing or removing the property. Other provisions contained in the law include an emergency seizure where necessary (§ 22-3-1380), procedures where the defendant cannot be found (§ 22-3-1400), method of service upon the defendant (§ 22-3-1410), etc.

In Op. Atty. Gen., Op. No. 3343 (July 12, 1972) we summarized the procedure in South Carolina for claim and delivery. Therein, we referenced the United States Supreme Court decision of Fuentes v. Shevin, 407 U.S. 67 (1972) which had declared certain claim and delivery procedures in other jurisdictions unconstitutional because of lack of notice and an opportunity to be heard prior to seizure. Contrasting South Carolina's procedure with the Supreme Court decision, we opined that South Carolina's procedure was valid and summarized such procedure as follows:

> [t]he ruling of the Supreme Court condemned seizure without notice and hearing -- not claim-and-delivery actions generally. In view of this, it is the opinion of this Office that

Claim-and-delivery actions under our present law may be instituted and carried into effect lawfully as follows:

1. Filing of affidavit as required by Section 43-172 [§ 22-3-1320] (no bond necessary since immediate seizure is not permitted.)

2. Issuance and service of magistrate's summons setting the matter for hearing as provided in Section 43-173 (§ 22-3-1320), second and third sentences.

3. Hearing (Trial). Section 43-181 (§ 22-3-1350).

4. Judgment. Section 43-182 (§ 22-3-1460).

5. Execution (if judgment for plaintiff). Section 43-184 (§§ 22-3-1470, -1480).

An excellent overview of the Claim and Delivery procedure is found in the Magistrate's Bench Book at II-59 through II-72. A number of additional points may be summarized therefrom as follows:

1. Claim and delivery cannot be maintained by one who does not have a general or specific property interest in the thing taken or detained. (at p. II-60).

2. The property claimed must be in South Carolina (II-60).

3. Claim and delivery may be instituted along with an action for the ultimate determination of title. (II-61).

4. There are four basic forms of claim and delivery under our existing statutes. These are

   a. Claim and delivery upon showing of danger or destruction or concealment (§ 22-3-1380) [known as true immediate dispossession, such dispossession occurs upon a determination by a

magistrate based upon affidavit; property may be immediately seized and held by officer].

b. Claim and delivery upon showing of waiver (§ 22-3-1360) [normally based upon waiver clause in contract if claimant shows a knowing and voluntary waiver by person in possession, magistrate may order delivery of property].

c. Claim and delivery for immediate dispossession (§ 22-3-1330) [notice to defendant of right to preseizure hearing which must be requested within 5 days of date of service; ultimate ownership of property is determined at a trial set from 5 to 20 days after service of summons.]

d. Claim and delivery for possession (§ 22-3-1310) [where immediate dispossession is not desired, dispossession and ultimate possession are determined at hearing, date set by summons from 5 to 20 days after service.]

The criteria for each of these forms is spelled out on pages II-62 and II-63. I am enclosing a copy of the entire discussion of claim and delivery actions contained in the Bench Book for your review.

You have also asked what fees are necessary to be collected by the magistrate in claim and delivery actions. The relevant fee statutes are found at §§ 8-21-1010 and 8-21-1060. Section 8-21-1010(6) provides that

> ... in all civil actions, for issuing a summons and a copy for defendant, and for giving judgment with or without a hearing, twenty-five dollars;

Subsection (3) of Section 8-21-1010 further states that

> ... for receiving and filing bond in claim and delivery, attachment, five dollars; if justification of sureties required, an additional five dollars;

Further, Section 8-21-1060(4) states that a

> ... for serving a summons, rule, order, or notice by a magistrate in a civil action, five dollars, plus mileage;

(emphasis added). It is evident that Sections 8-21-1010 and -1060 are somewhat ambiguous in terms of the total fees to be collected for claim and delivery and do not definitively state such exact amount. I am advised that the various counties collect different fees because of the confusion created. I am also advised that certain counties collect a standard "package" fee of $40.00 in every claim and delivery action (25 + 10 + 5) whether or not a bond and surety is posted. These counties' rationale is that the "mileage" envisioned in Section 8-21-1060(4) is so variable that a standard fee is necessary in the name of certainty and uniformity whether or not security is posted. This is probably a good approach for the larger urban counties, but may not be suitable for rural counties. It is my advice that the standard single fee approach is certainly not unreasonable in the absence of legislative clarification and has as its virtue the certainty of the fee. However, I cannot say that this $40.00 fee is absolutely required in every county or that those counties which are charging less than that amount are not acting in accord with the statute. Due to the fact that "mileage" is such a variable, it is almost inevitable that the fee will vary from place to place. Again, clarification is probably desirable.

In addition, I have been asked to review the policy of certain magistrates which states that the property described in the affidavit in a claim and delivery action must usually be identified by the property's serial number; that a plaintiff will not be allowed to list an excessive amount of property to be claimed as regard to debt owed; and that in order to obtain a disposal warrant (disposal of property subject to security interest), the plaintiff must prove "beyond a reasonable doubt that the particular Defendant did dispose of an item ... ." Such policy further states that "[j]ust because the items are not where they are supposed to be, does not mean the Defendant disposed of them."

With respect to the requirement of a serial number, while such may be preferable, I know of no legal requirement therefor. The Bench Book simply states that there should be a "detailed description of the property." Continuing, the Bench Book states that

> [t]he description should be detailed enough to allow the constable or sheriff to distinguish that piece of property from other similar items; a description of "one 19" television" is probably not sufficient and a claim and delivery action should not be instituted on the basis of such a vague description.

Id. at II-65.

I agree with this statement. The property sued for must be described "in such manner as to afford the means of identifying it ... ." 77 C.J.S., Replevin, § 52. The description should be as specific as reasonably necessary to identify the personalty, but would not necessarily mandate the provision of a serial number where proper identification could otherwise occur.

With respect to the issue of whether or not a plaintiff will be allowed to list "an excessive amount to be claimed as regard to debt owed," I do not believe the law imposes such limits in claim and delivery. The primary object of a claim and delivery action is the recovery of property, rather the settlement of a debt. 77 C.J.S., Replevin, § 5. It is commonplace to include collateral in excess of the debt owed in any security agreement. Just as often, the amount of collateral in a security agreement does not cover the debt owed and a deficiency judgment must be sought. Article 9 of the Uniform Commercial Code at § 36-9-504(1) addresses this precise question. This provision states that

> (1) [a] secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing.

Furthermore, § 36-9-504(2) provides that

> [i]f the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

The UCC's South Carolina Reporter's Comments indicate that § 36-9-504 (2) is simply a codification of "the established rule of the duty of the secured party to account to the debtor for any surplus and the right to any deficiency." This rule is expressed in Johnson Cotton Co. v. Cannon, 242 S.C. 45, 135 S.E.2d 311 (1964) where our Supreme Court stated that

> ... a conditional sales contract is in legal effect a chattel mortgage. When a chattel mortgage becomes past due one of

> the remedies available to the mortgage is that he may peaceably take possession of the chattel, advertise and sell it and apply the proceeds of sale to his secured debt, paying the surplus, if any, to the mortgagor. Speizman v. Guill, 202 S.C. 498, 25 S.E.2d 731. If there is a deficiency after the application of the proceeds of sale to the debt an action may be maintained against the mortgagor for the deficiency. Universal C.I.T. Credit Corp. v. Platt, 239 S.C. 103, 121 S.E.2d 351.

Id. at 49. Thus, the law does not limit a creditor in terms of the value of the collateral he deems necessary to secure a debt. Such is a matter between creditor and debtor. Oftentimes, the collateral is not sufficient to satisfy the debt owed and a deficiency judgment will be necessary. If the collateral does produce a surplus, that surplus is settled by return thereof to the debtor. Thus, I am unaware of any legal limitation upon the value or amount of collateral which can be repossessed in a claim and delivery proceeding. If there is any excess, it is usually returned to the debtor after satisfaction of the debt.

Finally, it is asked whether a policy wherein magistrates require the plaintiff to show beyond a reasonable doubt that the debtor "was in possession of a particular item" and has "disposed of" that property under lien before a warrant may issue pursuant to § 36-9-319 (sale or disposal of property under lien) is legally correct. It is further stated in such policy that "[j]ust because items are not where they are supposed to be, does not mean the Defendant disposed of them."

As referenced earlier, § 36-9-319 prohibits any person "who sells or disposes of any personal property subject to a security interest ... without the written consent of the secured party, and fails to pay the debt secured by the security interests within ten days after sale or disposal or fails in this time" to deposit the amount of the debt with the clerk of the court of common pleas for the county in which the secured party resides. This provision is part of the Uniform Commercial Code. The South Carolina Reporter's Comments describe this provision as follows:

> [t]his section, enacted as Act 525 of 1978, effective June 9, 1978, provides criminal penalties for disposing of personal property subject to a security interest where the proceeds are not applied to the debt. It replaces a similar provision in the 1962 South Carolina Code of Laws (Section 45-157) which was inadvertently left out of the 1976 Code and therefore repealed by implication.

Unquestionably, a key element of this offense is that a defendant must have "disposed of" the property in question. The phrase "dispose of" means to get rid of, part with, or bargain away. Miller v. City of Pasco, 310 P.2d 863 (Wash. 1957). However, a policy of requiring proof that the defendant was in "possession" of a particular piece of property at the time the security agreement is consummated is far more problematical.

Pursuant to the Uniform Commercial Code, a security interest includes "all properly identified property." 79 C.J.S., Secured Transactions, § 84. The security interest "is limited strictly to the property or collateral described in the security agreement." Id. Such property may not be owned by the debtor himself, but by a third party. S.C. Code, § 36-9-112. The security agreement may include "after-acquired property" if such is made clear by the terms of the agreement. Section 36-9-204. Thus, actual possession by the debtor at the time of the agreement is not necessary and is often not even possible. Thus, the security agreement listing the collateral controls the property covered.

The principal defense under the criminal statute is that the defendant did not know of or was unaware of the lien. Generally speaking, where there is a valid security agreement with properly listed collateral it will be extremely difficult, if not impossible, for the defendant to deny that he knew of the existence of the lien or that particular property was not covered by the security agreement. So long as the security agreement is itself valid, and there was no fraud or undue coercion or duress involved, the defendant will generally be estopped from denial of the existence of the lien. It is well-recognized that parties to an agreement are estopped to deny the recitals contained therein. Matter of Pubs, Inc. v. Champaign, 618 F.2d 432 (7th Cir. 1980). Where a "defendant understood that the paper was given to secure" the property involved for the debt owed, the criminal statute will be deemed to be violated upon sale or disposal of the property without payment as required. State v. Haynes, 74 S.C. 450, 453 (1906). Notice of the lien is all that is necessary. State v. Boyer, 86 S.C. 260, 266 (1910). Our Supreme Court has recognized that the mortgage itself will be deemed sufficient to show that the defendant executed it. State v. Perry, 87 S.C. 535 (1911).

Section 36-9-203 further provides that a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:

> (a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned;

(b) value has been given

(c) the debtor has rights in the collateral.

This provision does not specify that the property must be in actual possession of the debtor, but that the debtor simply must have "rights in the collateral ...."

Case law which has interpreted the phrase "rights in the collateral" under the UCC makes it clear that the debtor need not be in actual possession of the property, but that the security agreement itself is controlling with respect to the property which is subject to the agreement as collateral. For example, in Atchison v. Atchison, 832 F.2d 1329 (11th Cir. 1987), the Court held that a properly signed security agreement could not be gone behind in contending that certain property was not subject thereto. Inasmuch as there "was neither evidence of fraud nor ambiguity within the mortgage", the Court held that the agreement itself was controlling as to the property covered and thus the mortgagor's intent was irrelevant. Moreover, the Court emphasized that the security agreement could not be attacked on the ground that the debtor did not have "rights in the collateral". Such phrase, in the view of the Court, did not require that the debtor either own or be in actual possession of the property. Reasoned the Court,

> [i]ndeed all of the courts that have considered the question have ruled that an owner's permission to use goods as collateral creates rights in the debtor sufficient to give rise to an enforceable security interest. See In re Pubs, Inc. of Champaign, 618 F.2d 432, 436 (7th Cir. 1980) (individual debtor; corporate owner); K.N.C. Wholesale, Inc. v. AWMCO, Inc., 56 Cal. App. 3d 315, 128 Cal. Reptr. 345, 348 (1976) (parent corporation debtor; subsidiary owner); Murray v. Conrad, 346 N.W.2d 814, 820 (Iowa 1984) (individual debtor; corporate owner); GMAC v. Washington Trust Co. of Westerly, 120 R.I. 197, 386 A.2d 1096, 1098 (1978) (husband debtor; wife owner). Several other courts have held that a debtor's rights inn the collateral may be found from any rights going beyond mere possession, such as the right to use and control the collateral. See Douglas Guardian Warehouse Corp. v. Esslair Endsley Co., 10 U.C.C. 176, 184 (W.D. Mich. 1971); Bellrose v. Denver Florists' Federal Credit Union, 682 P.2d 1224, 126 (Colo. Ct. App. 1983); Morton Booth Co. v. Tiara Furniture, Inc., 564 P.2d 210, 214 (Okl. 1977); Uniroyal, Inc. v. Michigan Bank, 12 U.C.C. 745, 750 (Mich.

> Cir. Ct. 1972). Under both these principles, A & W had rights in the collateral. Atchison himself signed the mortgage on behalf of the corporation; even if he did own the equipment [personally] his signature for A & W was sufficient to infer his consent for its use as collateral. Alternatively, A & W had rights in the equipment considerably greater than mere possession because the equipment was in everyday use at the lumberyard.

Thus, "mere possession" is not the key element for purposes of whether a security interest is created. Cf. Segars v. Segars, 82 S.C. 196 (1908) [not necessary to show property in possession of defendant at time claim and delivery action commenced]. First and foremost, the courts look to the security agreement itself. Generally, where there is no indication of fraud or undue influence, such agreement cannot be gone behind.

It follows that the same reasoning would apply to the issuance of a warrant for purposes of § 36-9-319. To determine whether a person has sold or disposed of property subject to a "security interest", the central focus should be on the instrument creating such interest, the security agreement itself. Unless there is evidence of fraud or some other unusual circumstance, the security agreement should typically be controlling as to what property is subject to a security interest which may have been sold or disposed in contravention of § 36-9-319.

Conclusion

1. A magistrate can set a payment schedule for the satisfaction of a judgment in lieu of an execution only with the express agreement of the creditor.

2. Section 36-9-319 proscribes the sale or disposal of personal property which is subject to a security interest without written consent of the secured party and a failure to pay the debt secured within 10 days after sale or disposal or failure in this time to deposit the amount of the debt with the clerk of common pleas for the county in which the secured party resides. Depending upon the facts and circumstances involved, this statute could be applicable to the situation described in Question 2 of your inquiry.

3. The procedures for an action for Claim and Delivery are fully described herein. The fee statute as applied to actions for Claim and Delivery is ambiguous and different fee amounts are charged in the various counties because of the mileage requirements. A package fee of $40.00 is not unreasonable, however, due to the

ambiguity, I cannot say that any particular fee is the absolutely "correct" one. Clarification is desired.

4. The description of property claimed in the affidavit of a Claim and Delivery Action should be as specific as reasonably necessary to identify the personalty, but would not necessarily mandate the provision of a serial number where proper identification could otherwise occur.

5. I am unaware of any legal limitation upon the value or amount of collateral which can be repossessed in a claim and delivery proceeding. Obviously, common sense must be used, and if there is any excess, it is generally returned to the debtor after satisfaction of the debt.

6. To determine whether a warrant should issue for a violation of § 36-9-319 (prohibiting a person from selling or disposing of personal property subject to a security interest without the consent of the secured party), the magistrate should look primarily to the security agreement itself to determine if particular property has been "disposed of" in violation of the statute. Actual possession by the debtor at the time of the security agreement is not controlling and the security agreement itself should first and foremost be controlling as to whether the debtor had an "interest in the collateral" at the time.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an
Enclosures