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# The State of South Carolina

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September 25, 1985

Robert H. Orr, Jr., Sheriff
Chester County Sheriff's Department
Post Office Box 723
Chester, South Carolina 29706

Dear Sheriff Orr:

You have asked our interpretation of subsection (b) of Act No. 163 of 1985. Specifically, you wish to know what fee this provision authorizes the Sheriff to collect with respect to serving writs of execution. Apparently, the question has arisen whether the Act authorizes the collection of a fee of ten dollars for simply "lodging" an execution with the Sheriff, and in addition a separate fee of fifteen dollars for serving the writ; or, in the alternative, whether only ten dollars is authorized for the "lodging" and subsequent service and execution of the writ. Although the Act is ambiguous in this regard, for the reasons that follow, we believe the better reading is that a total fee of ten dollars is authorized. Thus, the better practice would be for the Sheriff to collect a fee of ten dollars, for executing executions, at least until the Legislature has the opportunity to clarify the new law.

Subsection (b) of Act No. 163 provides as follows:

> For service of any civil process, not otherwise herein specified, the fee is fifteen dollars for each completed service and five dollars for each attempted service; provided, the sheriff may not charge more than two attempted services on the same matter. For any execution lodged with the sheriff, the fee is ten dollars. (Emphasis added.)

REQUEST LETTER

Our Supreme Court has consistently recognized that costs and fees "... are in the nature of penalties and the statutes granting them have always been strictly construed." State et al. v. Wilder, 198 S.C. 390, 394, 18 S.E.2d 324 (1941). In other words, "... statutes providing for fees are to be strictly construed against allowing a fee by implication, with respect to both the fixing of the fee and the officer entitled thereto... ." 67 C.J.S., Officers, § 224. Therefore, if Act No. 163 authorizes a fee for simply "lodging" an execution writ and a separate fee for the service of that writ, such must be clearly stated in the Act itself.

Act No. 163 substantially amended § 23-19-10, which sets forth the general fee schedule for a sheriff. At first glance, it may appear that the Act authorizes a fee solely for the "lodging" of the execution with the Sheriff, without regard to other more significant services connected with the execution of the writ. However, close examination of the Act in its entirety, as well as the predecessor fee statute, demonstrates otherwise. It appears from the Act and its surrounding history that only a single fee was intended.

Act No. 163 seeks to consolidate a number of the many separate fees which were formerly authorized to be collected by a Sheriff when serving and executing process. This legislative purpose can particularly be seen with respect to executions. Formerly, § 23-19-10(11) authorized a fee for "levying an execution or attachment..."; and, if the Sheriff sought to levy, but had to make a "return on the execution of non est inventus or nulla bona ...", a different fee was charged. § 23-19-10(9). If an execution was "lodged" with the Sheriff, with orders not to levy, a still different fee was authorized. The Sheriff was also authorized to collect a fee for "each execution returned to the clerks office on schedule...." § 23-19-10(10). In addition, of course, the Sheriff received certain commissions for actually collecting on the executions. § 23-19-10(15).

Many of these separate fees for services rendered prior to such collection are now eliminated by the new Act. No mention is made in Act No. 163 of a fee for a "levy" or a return "nulla bona"; nor, is there now an authorized fee for "lodging" with orders not to levy. Moreover, no fee is now authorized for returning the execution to the Clerk on schedule. Instead, the Act simply consolidates these services into a simple fee for "any execution lodged with the Sheriff...." It is apparent that, for the sake of convenience and clarity, the Legislature attached a single fee at the earliest point in time where the

Sheriff had contact with the writ, its "lodging" with him for execution. Thus, we must start with the clear legislative purpose to combine the various formerly authorized fees concerning executions into a single fee, regardless of the disposition of the writ.

In construing the Act, it is well settled that this legislative purpose must be effectuated. As noted, an execution is "lodged" with the Sheriff when it is first delivered to him for execution; the term is synonymous with "filing." 25A Words and Phrases, p. 298; State v. O'Conner, Rice 150, 151 (1839). A writ of execution is not even considered "issued" until first it has been "lodged" with the Sheriff for execution. 33 C.J.S., Executions, § 67.

Once an execution has been "lodged" with the Sheriff, however, he is then commanded by the writ to "levy " upon the property, 33 C.J.S., Executions, § 76. As is generally recognized,

> [t]he levy of an execution has been defined to be the acts by which an officer sets apart or appropriates, for the purpose of satisfying the command of the writ, a part of the whole of a judgement debtor's property. Its object is to take property into the custody of the law, and thereby render it liable to the lien of the execution and put it out of the power of the judgment debtor to divert it to any other use or purpose.

33 C.J.S., Executions, § 88. Failure by the Sheriff to levy in accord with the terms of the writ may subject him to contempt. See, § 23-17-40; Bragg v. Thompson, 19 S.C. 572, 576 (1883) [execution is a "positive mandate" to the sheriff, requiring him "to execute"]; James v. Smith, 2 S.C. 183 (1870); M'Cool v. McCluny, Harp. 486 (1824); Farrar & Hays v. Wingate's Admors, 4 Rich. 35 (1850).

With the foregoing background in mind, the legislative purpose, indicated above would, in our view, hardly be effectuated if one fee were authorized simply for "lodging" the execution and another for the service thereof. In the first place, it is the levy of the execution and not the service which is "a prerequisite to an execution sale...." 30 Am.Jur.2d, Executions, § 221. As has been recognized,

> According to the great weight of authority, to enable the sheriff to sell the property and vest in the purchaser at the sale a valid title, a levy on the property so sold is indispensable, and this is generally true whether the property is personal or real.

33 C.J.S., Executions, § 91. In South Carolina, a lien is not established on personal property until there has been a levy or the execution. § 15-39-100. On the other hand, absent a statutory provision requiring service of the execution, such service is generally not, as a matter of state law 1/ necessary, "because the law presumes that the [judgment debtor] .. has notice of the judgment and he must ascertain at his peril, what subsequent proceedings are had." 30 Am.Jur.2d, Executions, § 240.

As noted above, while § 23-19-10(11), which had formerly authorized a separate fee for levy, has now been removed by the new Act, it is nevertheless logical to assume that any fee for the levying of the execution is now encompassed in the single ten dollar fee authorized for every execution "lodged" with the Sheriff. 2/ And, as already mentioned, the "lodging" of the writ possesses in itself little significance, except to show that the writ has been formally issued and has been placed in the Sheriff's hands for levy. In view of these facts, we seriously doubt that the Legislature intended to require a ten dollar fee for merely "lodging" the execution and a fifteen dollar fee for its service, yet no fee for levy; or in the alternative, that the Legislature wished to authorize a ten dollar fee for the most significant function in the execution

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1/ However, Section 23-15-40 requires the Sheriff to "serve, execute and return every process, rule, order or notice issued by my court of record in this State or by other competent authority..." Moreover, our comment above is not intended to indicate that no service is necessary as a matter of federal constitutional law.

2/ Of course, the new Act also provides to the Sheriff certain commissions for collecting on the executions. See, subsection (a).

process, i.e. the levy, but a separate, higher fee of fifteen dollars for simply serving the writ. 3/ Neither of these alternatives seems logical, and thus we prefer to construe the statute against charging a higher fee, by reading the Act as authorizing a single fee of ten dollars for the entire process of executing the writ.

Our reading of the Act is consistent with the fact that "service" of process, with respect to executions, does not have the same meaning as the term generally has with regard to other process. In Fallows v. Continental & Commercial Trust and Savings Bank, 235 U.S. 300, 59 L.Ed. 238, the United States Supreme Court stated:

> Service of an execution includes every act and proceeding necessary to be taken by the sheriff to make the money, and includes the sale of the property when necessary. The word has been defined to mean execution of process. (Emphasis added.)

235 U.S. at 302. See also, 33 C.J.S., Executions, § 48. Thus, with respect to an execution, the term "service" of process normally includes not only the levy of the execution and the sale pursuant thereto, but even the "lodging" of the writ with the Sheriff for levy and sale. This being the case, that portion of

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3/ We cannot see the rationale of providing a fee simply for "lodging" the execution, unless such fee is intended to embrace the subsequent acts of service and levy, which the Sheriff is required by the writ to carry out. Perhaps an argument can be made that a "lodging" fee is for recording the execution in the Sheriffs' execution book, pursuant to § 23-15-20(2). Formerly, a fee was authorized for such recordation. See, § 23-19-10(1). Still, such a reading would mean that the legislature intended no fee to be charged for the most significant function in the execution process, the levy. Again, we prefer to read the term "lodge" as including every step in the process of executing the writ, including recordation, service and levy; this would provide a single fee for the various steps performed by the Sheriff in the execution process.

subsection (b) of Act No. 163 which relates to service of process generally would be inapplicable to the "service" of an execution. 4/

Indeed, examination of the Act in its entirety as well as general rules of statutory construction, are supportive of this interpretation. A statute should be construed so that all of its parts harmonize with each other, consistent with the general scope and object of the Act. Crescent Mfg. Co. v. Tax Comm., 129 S.C. 480, 120 S.E. 761 (1924). Moreover, where there exists in a statute a special provision which would otherwise be embraced in a general provision on the same subject, the special provision is deemed to be an exception and not intended to be embraced in the general provision. State v. Bowder, 92 S.C. 393, 75 S.E. 866 (1912).

It is apparent that the portion of subsection (b) concerning service of civil process is general in nature, whereas that part concerning executions is specific. Applying the foregoing rules of statutory construction, the two parts of the subsection must be read harmoniously with the result that the ten dollar fee is controlling with respect to the service of executions. The fact that executions were dealt with separately in the same paragraph as service of process is also significant as is the fact that executions were treated in the last part of the paragraph in much the same manner as a proviso or an exception. These factors further indicate that the part of the subsection (b) dealing with executions was intended to be self-contained and exclusive in that area.

In addition, certain language in subsection (b) itself provides further support for this conclusion. The subsection explicitly states that the fee to be charged "[f]or service of any civil process" relates only to such process "not otherwise herein specified...." As discussed above, because the fee for

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4/ It is true that our construction of the Act results in a lower execution fee than is authorized for other similar processes such as claim and delivery, writs of assistance, distress warrants, etc. It could be argued that such indicates the General Assembly intended a ten dollar charge plus a fifteen dollar fee for service. Again, however, we do not read the Act that way and it would be a matter for the Legislature to expressly authorize a higher fee. Moreover, as mentioned in fn. 2, the new Act provides to the Sheriff certain commissions for collecting on the executions.

"lodging" an execution probably encompasses more than the mere placement of the writ in the Sheriff's hands for levy, we believe the service of an execution would be a process "otherwise ... specified" in the Act and thus would not be controlled by the general service of process portion of subsection (b). 5/

In conclusion, until the General Assembly clarifies Act No. 163, we believe that the better reading of subsection (b) of Act No. 163 would be that a total fee of ten dollars is authorized for executing a writ of execution, including the service thereof. This reading is in accord with the rule of strict construction of the fee statute.

If we can be of further assistance, please let us know. With kindest regards, I remain

Very truly yours,

Robert D. Cook
Executive Assistant for Opinions

RDC:djg

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5/ Reference to subsection (c) emphasizes the point. Such provision authorizes a fee of twenty five dollars for "claim and delivery, writs of assistance, distress warrants ... [etc.]" We surely would not read that provision as authorizing a twenty five dollar fee simply for "lodging" those writs (although they like executions, are "lodged" with the Sheriff) and another fifteen dollar fee for subsequent "service" of the writ pursuant to subsection (b). Such a reading would be clearly unreasonable because the various writs mentioned in subsection (c) are "otherwise ... specified" and thus exempt from the charge authorized in subsection (b). In other words, we read the portion of subsection (b) relating to service of process simply as a "catchall" provision encompassing those writs not elsewhere mentioned in the Act. Pursuant to this construction, the fee for executing a writ of execution, including the service of the writ, would be ten dollars.