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Office of the Attorney General

State of South Carolina
Opinion No. 79-7
January 12, 1979

***1 SUBJECT: Landlord and Tenant, Magistrates**

(1) A sheriff or his deputy does not have the authority to break, and enter a house, after request and refusal, to distrain sufficient property upon the rented premises to pay rent and costs under the authority of a distress warrant.

(2) A judgment in an ejectment action does not authorize an officer to use physical force to remove the property and person in possession of the disputed premises; however, a magistrate may in his discretion after adjudication of the rights of the parties issue a Writ of Possession which would authorize a proper officer to use such force as is necessary to put the plaintiff in possession.

TO: Joseph M. McCulloch, Jr.
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QUESTIONS:

1. Does a sheriff or his deputy have the authority to break and enter a house, after request and refusal, to distrain sufficient property upon the rented premises to pay rent and costs under the authority of a distress warrant?

2. Can a warrant of ejectment be executed pursuant to the provisions of Section 27–37–40 in the absence of the defendant tenant and, if necessary, can the constable or sheriff make forcible entry into the premises to accomplish the ejectment?

AUTHORITIES:

Opinions dated June 15, 1978, and June 20, 1978, addressed to Neal Forney; 1964 Ops. Att'y Gen. No. 1720, p. 196; Sections 27–37–40, 15–69–180, 22–3–1420, 23–15–60, 27–37–100, 27–39–240 Code of Laws of South Carolina, 1976; Sections 8812, 8813, Code of Laws of South Carolina, 1942; 82 C.J.S. Statutes, Section 292, pp. 496–497; State v. Christensen, 194 S.C. 131, 9 S.E.2d 555 (1940); Jones v. Parker, 81 S.C. 214, 62 S.E. 261; Burnett v. Boukedes, 240 S.C. 144, 125 S.E.2d 10 (1962); Hamilton v. Blanton, 107 S.C. 142, 91 S.E. 275 (1917); Rutland v. Paulling, 173 S.C. 320, 175 S.E. 534 (1934); Black's Law Dictionary, p. 838 (Revised 4th Ed. 1968); Hill v. Resort Development Company, 251 N.C. 52, 110 S.E.2d 470 (1959); Bond v. Long, 338 Ill.App. 1, 86 N.E.2d 585 (1949); Ex Parte Black, 2 Bailey 8; Bartley v. Bingham, 34 Fla. 19, 15 So. 592.

DISCUSSION:

Previous opinions dated June 15, 1978, and June 20, 1978 have been issued by this Office in answer to the above questions. This opinion is an attempt to clarify those questions raised in response to those opinions.

As to the questions concerning distraint, the opinion dated June 15, 1978, referenced an earlier opinion of this Office and stated that:

the authority to break and enter a residence building under civil process may be exercised in claim and delivery only—unless the authority is granted in other types of civil actions by special statute not discussed here . . .. Collection of rent by distraint on a tenant's property . . . does not come within the authority conferred by . . . (those sections dealing with claim and delivery) . . . and the Sections relating to such distraint do not empower officers to break the outer doors of residences. 1964 Ops. Att'y Gen. No. 1720, p. 196.

***2** Concerning the question of the right to use force to accomplish an ejectment pursuant to Section 27–37–40 of the 1976 Code of Laws, the opinion of this Office dated June 20, 1978, stated that inasmuch as the referenced section did not specifically grant authority to a constable or sheriff to forcibly enter to eject a particular tenant, such authority did not exist.

As stated, these earlier opinions referenced the fact that forcible entry is not permitted in ejectment or distraint actions unless specifically authorized by statute. It was referenced that in claim and delivery actions forcible entry is specifically permitted inasmuch as Section 15–69–180 of the 1976 Code of Laws states that as to claim and delivery actions:
(i)f the property or any part thereof be concealed in a building or enclosure the sheriff shall publicly demand its delivery. If it be not delivered he shall cause the building or enclosure to be broken open and take the property into his possession and, if necessary, he may call to his aid the power of his county.

Section 22–3–1420 of the 1976 Code of Laws is a similar provision as to claim and delivery actions before magistrates which grants constables the right to forcibly enter.

Prior to an Act by the General Assembly in 1946, which was enacted to define the law relative to landlords and tenants and provide remedies for matters relating thereto, the use of 'such force as may be necessary' to remove a tenant was permitted in ejectment actions. [See Sections 8812, 8813, Code of Laws of South Carolina, 1942]. However, by those sections of the 1946 Act now codified as Sections 27–37–40 and 27–37–100 in the 1976 Code of Laws such authorization of force was not granted. As to ejectment, Section 27–37–40 provides that
(i)f the tenant fails to appear and show cause within the aforesaid ten days then the magistrate shall issue a warrant of ejectment and the tenant shall be ejected by his regular or special constable or by the sheriff of the county.

Section 27–37–100 makes a similar provision for ejectment if, after a jury trial, the landlord-plaintiff prevails.

As a general rule of statutory construction,
(w)here a later statute covers the whole subject of, and shows that it was intended as a subject for, earlier acts, and to cover the whole subject and prescribe the only rules with respect thereto, it operates as a repeal of all former statutes relating to the subject, even though it makes no reference to the earlier statutes. 82 C.J.S. Statutes, Section 292, pp. 496–497.

Therefore, any grant of authority to forcibly enter a tenant's premises in an ejectment action may be considered to have been abandoned by the repeal by the 1946 Act of the former sections concerning ejectment.

A review of previous decisions of the South Carolina Supreme Court indicates that forcible entry of particular premises for the purpose of enforcing a distress warrant is also not permitted. As to the enforcement of a distress warrant, Section 27–39–240 of the 1976 Code of Laws states:
***3** (t)he officer to whom a distress warrant is delivered, after the predistress hearing, shall forthwith demand of the tenant payment of the rent with costs as enumerated in the distress warrant. If such amount is paid the officer shall return the warrant with the amount collected to the magistrate who shall settle with the landlord. If the tenant fails or refuses to pay such rent with costs the officer shall distrain sufficient of the property upon the rented premises to pay such amount, giving the tenant a list in writing of the property distrained together with a copy of the distress warrant.

In State v. Christensen, 194 S.C. 131, 9 S.E.2d 555 (1940), the South Carolina Supreme Court in its opinion affirming the conviction of an agent of a landlord who had forcefully entered a particular tenant's premises pursuant to a distress warrant to secure the possession of certain property, referred to the earlier decision of Jones v. Parker, 81 S.C. 214, 62 S.E. 261, in stating that:

This court . . . has held that in the levying of a distress warrant a person cannot break the house in order to make an entry and . . . in order to levy a distress warrant the landlord or his agent is required to get peaceable possession of the property levied upon. 194 S.C. at 139.

In Christensen the Court similarly stated:

If, therefore, the defendant in this case broke and entered into the dwelling house of the tenant for the purpose of securing possession of property under the distress warrant which was required to be taken in a peaceable manner, he is guilty of a trespass and an invasion of the rights of the tenant unwarranted in law. 194 S.C. at 139.

Therefore, forcible entry in an attempt to levy a distress warrant is not authorized.

However, in Christensen the Court indicated that while an individual could not lawfully break and enter to levy a distress warrant, (t)he proper legal remedy . . . upon being unable to obtain peaceable possession of the property . . . (is) . . . to secure a claim and delivery or other legal process authorizing a proper officer to enter the premises. 194 S.C. at 140.

Such a procedure was similarly approved in Burnett v. Boukedes 240 S.C. 144, 125 S.E.2d 10 (1962); Hamilton v. Blanton, 107 S.C. 142, 91 S.E. 275 (1917); and Rutland v. Paulling, 173 S.C. 320, 175 S.E. 534 (1934).

The decision in Burnett which is the most recent decision called to our attention clearly implies that the only proper procedure available where the landlord is unable to obtain peaceable possession of the property, that is to say he is unable to levy on the property on the premises, is to institute a claim and delivery action.

In the Christensen decision the Court stated that the proper procedure was to 'secure a claim and delivery or other legal process.' At this point we have been unable to determine what other legal process there is except an action for claim and delivery. It is certain, however, that a distress warrant in itself does not authorize forceable entry. In view of the language in Christensen, however, we are not prepared to say that there does not exist some equitable remedy which can be obtained from a Circuit Court authorizing a proper officer to use forcible entry in attempting to levy on the property on the premises.

***4** Section 23–15–60 of the 1976 Code authorizes a sheriff or his deputy to break and enter any house after request and refusal to seize the goods of anyone in such house provided that the sheriff or his deputy have process requiring the seizure of such goods. If a Court of Equity, therefore, directed the sheriff or his deputy to seize such goods, the statute clearly permits the breaking and entry of the premises. As previously pointed out, however, we have been unable to find what legal process is available to enforce a distress warrant. The party asserting such a right would have the burden of establishing a cause of action.

In the previous opinions referred to dealing with ejectment and distress warrants, we directed attention to the possibility of applying to a Court of Equity for relief. Of course, magistrates' courts have no equitable powers and this was the basis for our stating that the landlord should seek relief in the Circuit Court. A Court of Equity has the jurisdiction to entertain a Petition for a Writ of Assistance and to issue same so as to aid in the execution of a judgment at law and put the complainant into possession of land to which he has been previously adjudicated entitled.

It appears, however, that a magistrate's court has the jurisdiction to issue the same type of writ. A Writ of Possession is the process commonly resorted to by the successful party in an action of ejectment, for the purpose of being placed by the sheriff in the actual possession of the land recovered. Black's Law Dictionary, p. 838 (Revised 4th Ed. 1968). This writ is technically known as a Writ of Habere Facias Possessionem. It is clear that this process is recognized and available in this State. See Sections 23–15–20, 23–19–10, and 14–19–20, of the 1976 Code. The purpose of this writ is to enforce a judgment in ejectment. Hill v. Resort Development Company, 251 N.C. 52, 110 S.E.2d 470 (1959). It is an order entered in aid of a judgment whereby the court in which judgment has been rendered orders that possession of the premises be immediately given up.
There is no doubt that an officer acting under the authority of such a writ properly issued by a court with jurisdiction over the subject matter and the parties may use such force as is necessary under the circumstances to dispossess a tenant. Bond v. Long, 338 Ill. App. 1, 86 N.E.2d 585 (1949).

Although the matter is not free from doubt, after reviewing all of the authorities found by us it appears that the judgment in the ejectment action itself does not authorize the use of force to put the complainant into possession. The Writ of Possession is issued by the Court, subsequent to the adjudication of the right, directing the sheriff to put the complainant into possession of the premises. The sheriff in executing the Writ is bound to put the plaintiff into complete possession and to dispossess all other persons whether parties to the record or not. Ex Parte Black, 2 Bailey 8. The process is not a 'Writ of Ejectment' even though by ordinary definition the expulsion or ouster of the defendant results from the execution of the Writ.

***5** We think it is clear that a magistrate's court has jurisdiction to issue a Writ of Possession and that such a Writ is a final process. It has been held that the mere fact that a Court erroneously issued a 'Writ of Ejectment' upon which the sheriff forceably put the plaintiff in possession of the property was not reversible error. Bartley v. Bingham, 34 Fla. 19, 15 So. 592. The reviewing court there stated that the judgment in the case was sufficient to authorize a Writ of Possession and it should not be reversed simply because the lower court technically issued the wrong writ to enforce it. The court stated that the proper remedy was by motion to quash the Writ in the lower court.

Many states have codified the procedures with respect to Writs of Possession. These statutes all stress that the issuing court should use sound discretion in the issuance of a Writ of Possession. They generally provide that if the court feels that issuing the Writ would cause hardship because of the unavailability of other accommodations, the court might stay the issuance of the Writ and cause it to issue at a later time which it deems proper under the circumstances. That is to say when an ejectment action is commenced the court may proceed to judgment determining who is rightfully entitled to possession, but, in any event, decline to issue the Writ of Possession until such time as the court is satisfied in its discretion that such would not cause unnecessary hardship. We are satisfied that a magistrate would have the same discretion under the procedure in this State. appropriate form is found in the Am. Jur. Pleading and Practice Forms.

CONCLUSION:

It is therefore the conclusion of this Office that a magistrate's constable or sheriff's deputy may, pursuant to a distress warrant issued by a magistrate, enter upon the described premises and physically levy on and remove such personal property which would be sufficient to satisfy the warrant. If, however, the tenant refuses to voluntarily admit the officer, physical force may not be used to execute the warrant and the officer is not authorized to break in order to enter on the premises. The proper remedy in such a case is for the landlord to pursue an action for claim and delivery. In that event, the officer does have the authority to use force to gain entry and take the property into his possession.

A judgment in an ejectment action does not authorize an officer to use physical force to remove the property and person in possession of the disputed premises. A magistrate in his discretion, however, may after adjudication of the rights of the parties issue a Writ of Possession which would authorize a proper officer to use such force as is necessary to put the plaintiff in possession of the premises and remove all other parties in possession.

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