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Office of the Attorney General

State of South Carolina

Opinion No. 79-81

June 12, 1979

***1 SUBJECTS: Mechanic's Liens, Attachments, Executions, Judgments, Landlord and Tenant, Magistrates**

A magistrate's constable is authorized to conduct sales as to distrained property and as to property attached which result from actions initiated in a magistrate's court but is not authorized to conduct a sale to enforce a mechanic's lien. While apparently there is authority for a magistrate's constable to conduct a sale to satisfy a judgment rendered in a magistrate's court, the preferred procedure is to have a sheriff conduct a sale resulting from such a judgment.

TO: Neal Forney
Assistant Director
South Carolina Court Administration

QUESTION:

Do magistrates' constables have the authority to conduct judicial sales in cases of distraint, execution, attachment, and mechanics' liens?

AUTHORITIES:

[Sections 27-39-320, 27-39-210, 22-3-10\(4\), 15-19-10 et seq., 22-9-110, 29-5-130, 29-5-260, 15-39-610 et seq., 22-9-80 et seq., 15-39-10 et seq., 22-3-310, 22-3-320, Code of Laws of South Carolina, 1976](#); letter from Attorney General Callison to Magistrate Foster, June 16, 1955; [Robinson v. Cooper](#), 1 Hill (19 SCL) 286 (1833); [Kerr v. Montgomery](#), 1 Hill (19 SCL) 277 (1833); [Carrier v. Thompson](#), 11 S.C. 79 (1878).

DISCUSSION:

As to the authority of a magistrate's constable to conduct a sale as to distrained property, please be advised that [Section 27-39-320 of the 1976 Code](#) of Laws states that if a tenant fails to give bond to free property from distraint, ' . . . the officer may sell such property at public auction . . . ' The term 'officer' is used throughout the sections referring to distraint, as in [Section 27-39-320](#), without specific definition. However, [Section 27-39-210 of the 1976 Code](#) states that for purposes of a distress proceeding, the notice detailing the rent due and the time and place of a predistress hearing:

. . . shall be delivered to (a) any regular constable, (b) such special constable as the magistrate may appoint or (c) the sheriff of the county for enforcement. Such officer shall forthwith serve a copy of the notice . . .

It may be implied that inasmuch as the term 'officer' is not further defined in other sections relating to distraint, such term includes those 'officers' specifically referenced by [Section 27-39-210](#). Therefore, it may be concluded that the term 'officer' as used in [Section 27-39-320](#) was meant to include those individuals expressly referenced in [Section 27-39-210](#) and thus, a magistrate's constable is authorized to conduct a sale as to distrained property.

Concerning the authority of a magistrate's constable to conduct a sale as to property attached, magistrates have civil jurisdiction, pursuant to [Section 22-3-10\(4\) of the 1976 Code](#) of Laws as amended, . . . (i)n actions commenced by attachment of property, as provided by statute, if the debt or damages claimed to not exceed five hundred dollars; . . .

*2 An attachment action is governed generally by [Sections 15-19-10 et seq.](#) of the 1976 Code of Laws and such sections refer specifically to the manner of proceeding on an attachment action in magistrate's court. More specifically, [Sections 15-19-210 et seq. of the 1976 Code](#) of Laws reference the execution of a warrant of attachment and refer to the actions of a constable in such regard. As to the matter of a sale conducted by a magistrate's constable pursuant to an attachment, [Sections 15-19-280, 15-19-350, 15-19-360, and 22-9-110 of the 1976 Code](#) specifically reference a sale by a magistrate's constable. Therefore, pursuant to the above authority, it appears that by statute a magistrate's constable is authorized to conduct a sale as to property attached by a magistrate.

As to the authority of a magistrate's constable to conduct a sale to enforce a mechanic's lien, [Section 29-5-130 of the 1976 Code](#) of Laws states:

(w)hen the amount of the claim does not exceed one hundred dollars the lien may be enforced by a petition to a magistrate. And such magistrate shall have like power and authority within his jurisdiction as herein conferred upon the court of common pleas . . .

Therefore, pursuant to the above, those code sections following the above-referenced section detailing the manner of proceeding to enforce a mechanic's lien are applicable to a magistrate's court.

As to a sale pursuant to such an action, there is no authority specifically authorizing a magistrate's constable to conduct such a sale. However, [Section 29-5-260 of the 1976 Code](#) does state that:

(i)f the lien is established in favor of any of the creditors whose claims are presented the court shall order a sale of the property to be made by such officer as may be authorized by law to make sales of property. (emphasis added)

[Sections 15-39-610 et seq.](#) of the 1976 Code of Laws provide for judicial sales generally. In [Section 15-39-630](#), reference is made to sales by a probate judge, a clerk of court, and a master. Such section, however, concludes with the statement, 'all other judicial sales shall be made by the sheriffs.' Additionally, [Section 15-39-640 of the 1976 Code](#) of Laws provides in part that '(a)ll judicial sales shall be made by the sheriff, unless otherwise provided by law.'

As stated, I am unaware of any specific provision which authorizes a magistrate's constable to conduct a sale to enforce a mechanic's lien. Similarly, my research has not revealed any case law specifically referencing the authority of a magistrate's constable to conduct such a sale. Therefore, inasmuch as a magistrate's constable is not authorized to conduct judicial sales generally pursuant to [Section 15-39-610 et seq.](#), it would appear that without further legislative authorization, a magistrate's constable is without authority to conduct a sale to enforce a mechanic's lien.

As to the authority of a magistrate's constable to conduct a sale to satisfy a judgment rendered in a magistrate's court, a previous opinion of this office, a letter from Attorney General Callison to Magistrate Foster dated June 16, 1955 did reference such authority. The opinion stated in part that:

*3 (u)nder Sections 43-320 through 43-333, Vol. 4 of the Code of Laws of 1952 a magistrate's constable is authorized to serve executions, levy upon and sell property to satisfy judgments issuing out of the Magistrate's Court. When an execution is served and a levy is made upon personal property, the Constable may, under such execution, take immediate possession of so much of the judgment debtor's property as is necessary to pay the indebtedness. He needs no other authority than an execution issued under a valid judgment.

The sections referenced above are now codified as [Sections 22-9-80](#) through [22-9-170](#) in the 1976 Code of Laws. (Apparently the reference to Sections 43-332 and 43-333 was an error inasmuch as no such sections appear in the 1952 Code of Laws).

In addition to the above, early decisions of the courts in this State reference a constable's sale resulting from a judgment of a magistrate's court. See: [Robinson v. Cooper](#), 1 Hill (19 SCL) 286 (1833); [Kerr v. Montgomery](#), 1 Hill (19 SCL) 277 (1833); [Carrier v. Thompson](#), 11 S.C. 79 (1878). However, as compared to the statutes concerning judicial sales generally which as earlier referenced are found in [Sections 15-39-610 et seq.](#) of the 1976 Code of Laws, the procedure for a sale by a magistrate's constable is not so clearly defined. As to the question of whether the procedures outlined by [Sections 15-39-610 et seq.](#) may be determined to be applicable to a sale conducted by a constable, a review of such sections indicates that they are probably inappropriate to any sales by a magistrate's constable. I have found no specific references in such section to a sale by a magistrate's constable. Furthermore, as noted previously, Section 15-39-630 details specifically where and by whom judicial sales may be made. Included are sales by a probate judge, a clerk of court, and a master with the further provision that 'all other judicial sales shall be made by the sheriffs.'

With reference to the above, while there appears to be some authority for a magistrate's constable to conduct a sale to satisfy a judgment, the procedure for conducting a sale is not so clearly defined and potential problems exist due to the lack of a clear legislatively defined procedure. Such problems, however, could be more easily avoided by allowing sheriffs to conduct all such sales. As indicates, [Sections 15-39-610 et seq.](#) clearly define the procedures for judicial sales conducted by sheriffs. Therefore, in the opinion of this office, the preferred procedure is for sheriffs to conduct all sales held to satisfy a judgment rendered in a magistrate's court. This is especially true in light of the further statement of this office in an opinion of this same date that those sections of the Code concerning executions generally, [Sections 15-39-10 et seq.](#) of the 1976 Code of Laws, do not appear to be applicable to executions issued by a magistrate. This office has indicated that while there appears to be authority in [Section 22-3-310 of the 1976 Code](#) of Laws for magistrates to issue executions on judgments rendered in their courts, the preferred procedure is to have all judgments docketed with the clerk of court of a particular county pursuant to [Sections 22-3-320](#) and [15-39-90 of the 1976 Code](#) of Laws.

CONCLUSION:

*4 (1) Inasmuch as a magistrate's constable may be considered to be within the definition of 'officer' as such term is used in [Section 27-39-320](#), it may be concluded that a magistrate's constable is authorized to conduct a sale as to distrained property.

(2) It is specifically referenced that a magistrate's constable is authorized to conduct a sale as to property attached by a magistrate.

(3) Inasmuch as there is no specific authorization for a magistrate's constable to conduct a sale to enforce a mechanic's lien and a magistrate's constable is not authorized to conduct judicial sales generally, it appears that a magistrate's constable is without authority to conduct a sale to enforce a mechanic's lien.

(4) While there appears to be authority for a magistrate's constable to conduct a sale to satisfy a judgment, in light of the problems that may arise due to the lack of a clearly defined procedure for such sales, the preferred procedure is for sheriffs to conduct all such sales held to satisfy a judgment rendered in a magistrate's court.

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