

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

April 17, 1985

Patricia A. Torkildson, Esquire
Cudis Insurance Society, Inc.
Post Office Box 391
Madison, Wisconsin 53701

Dear Ms. Torkildson:

Thank you for your letter of February 22, 1985, posing four questions concerning application of the Commission's Credit Practices Rule (16 C.F.R. Part 444).

First, you ask whether the Rule prohibits a creditor from using, in a security agreement, the waiver permitted by Section 22-3-1360 of the South Carolina Code. When self-help repossession cannot be accomplished, the Code permits a creditor to seek possession of collateral through a Claim and Delivery proceeding. Property cannot be seized under such a proceeding unless the party possessing it is given five days' notice and an opportunity to be heard at a preseizure hearing before a magistrate. The purpose of such hearing is to protect the defendant's use and possession of property from arbitrary encroachment and to prevent unfair or mistaken deprivations of property (Code, Section 22-3-1350).

Section 22-3-1360 provides that any person possessing the personal property may waive the right to a preseizure hearing if the waiver is conspicuously displayed in the contract and includes the wording "waiver of hearing prior to immediate possession." For any such waiver to be effective, the plaintiff must show by affidavit that the defendant has in writing by contract or separate written instrument, voluntarily, intelligently and knowingly waived his right to a hearing prior to the repossession of such personal property.

You inquired whether the waiver permitted by Section 22-3-1360 of the South Carolina Code is prohibited by Section 444.2(a)(1) of the Rule, which prohibits cognovits, confessions of judgment, warrants of attorney or other waiver of the right to notice and the opportunity to be heard in the event of suit or process thereon. The waiver does not involve consenting in

advance to a judgment. It does, however, permit the plaintiff to obtain a magistrate's order for immediate delivery of the property to the plaintiff (Section 22-3-1360), and may result in the taking of property by a constable (Sections 22-3-1410, 22-3-1420) without the pre seizure hearing otherwise required. In sum, the waiver permits the plaintiff to repossess property through a magistrate's order and the assistance of law enforcement officials without a hearing, when self-help repossession is not feasible.

In our view, Section 444.2(a)(1) of the Rule prohibits a creditor from taking or receiving an obligation that constitutes or contains such a waiver, because it is a "waiver of the right to notice and the opportunity to be heard in the event of suit or process thereon." While the Claim and Delivery proceeding is not a suit resulting in a judgment concerning the ownership of property, it is a proceeding before a magistrate, resulting in an order and deprivation of personal property by the state without the notice and hearing that are normally a part of a Claim and Delivery proceeding under South Carolina law. We conclude the waiver is prohibited.

Your second question is whether Section 444.2(a)(4) of the Rule prohibits a creditor from including a cross-collateral or future advance clause in a purchase money security agreement for household goods. The Rule's Statement of Basis and Purpose contains the following statement relevant to your question:

The rule does not apply to purchase money security interests. When a purchase money loan is refinanced or consolidated, we intend that, for purposes of this rule, the security collateralizing the prior loan can continue to secure the new loan, even if the new loan is for a larger amount or is in other respects a non-purchase money loan. (49 Fed. Reg. at 7767).

We conclude that the Rule does not prohibit cross-collateral or future advance clauses in purchase money security agreements for household goods, to the extent that these clauses allow the security agreements for household goods to apply to refinancings or consolidations of the original purchase money credit transaction.

Your third question is whether the Rule prohibits a creditor from enforcing provisions in contracts consummated before March 1, 1985 (the effective date of the Rule) that will be prohibited after that date.

The Rule does not prohibit a creditor from enforcing provisions in such contracts, with the exception of the prohibition against pyramiding of late charges under Section 444.4. Late charges prohibited by that provision cannot be levied

or collected after March 1, 1985, even if authorized in a clause in a contract signed prior to that date.

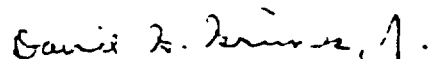
Your last question is whether a creditor can require that a revocation of a wage assignment be in writing and be received by the lender a specified number of days before the revocation is given effect. Section 444.2(a)(3) prohibits lenders and sellers from taking an obligation that constitutes or contains an assignment of wages or other earnings unless the assignment by its terms is revocable at the will of the debtor, constitutes a payroll deduction or preauthorized payment plan, or is an assignment of wages already earned.

In our view, the creditor is permitted to require that the revocation of a wage assignment be in writing, if permitted by state law and if the wage assignment was in writing. Requiring that such revocation be in writing would assure that the proper party is revoking the wage assignment. This would protect both the assignor and the creditor from the adverse consequences of an improper revocation. The creditor may not impose limitations on the form of the revocation other than to require that it be signed by the consumer, if state law permits.

In light of the requirement of Section 444.2(a)(3)(i) that a revocable wage assignment be "revocable at the will of the debtor," (emphasis added) the creditor may not require that a revocation be received a specified number of days before it is given effect. We construe the quoted language to mean that the debtor may revoke at any time.

This letter represents the current enforcement opinion of the staff and is not binding upon the Commission. Please do not hesitate to contact us if you have further inquiries.

Sincerely,



David G. Grimes, Jr.
Attorney
Division of Credit Practices

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February 22, 1985

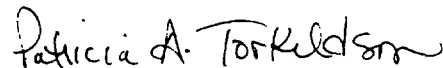
David G. Grimes, Jr.
Division of Credit Practices
Bureau of Consumer Protection
Federal Trade Commission
Washington, DC 20580

Dear Mr. Grimes:

Recently I discussed with you, in a telephone conversation, whether the Credit Practices Rule prohibits creditors from using a waiver provision permitted by the South Carolina Code. You requested more information in writing and a copy of the statute. Both are attached to this letter as well as several other questions which have come up since then.

I imagine you are swamped with questions such as mine, so I appreciate your taking the time to talk to me. I will look forward to your response to the questions I have posed. If you need any further information, you can contact me at (608) 231-7009.

Sincerely yours,



Patricia A. Torkildson

PAT:pc
Attachments

1. Does the Credit Practices Rule prohibit a creditor from using, in a security agreement, the waiver permitted by S.C. Code §22-1360?

It is clear that the Credit Practices Rule does not prohibit self-help repossession, which is provided for by §9-503 of the Uniform Commercial Code. When self-help repossession cannot be accomplished, a creditor may seek possession of collateral through a Claim and Delivery proceeding. The South Carolina Code provides that property cannot be seized under the Claim and Delivery process unless the party who has possession is given five days' notice and an opportunity to be heard. Section 22-3-1360 also provides, however, that "any person in possession of the personal property may waive the right to a pre-seizure hearing, if the waiver is conspicuously displayed in the contract and includes the wording 'waiver of hearing prior to immediate possession.'" Mere presence of a conspicuous waiver in the contract does not make the waiver automatically effective. In addition, §22-3-1360 requires that "the plaintiff by affidavit must show that the defendant has in writing by contract or separate written instrument voluntarily, intelligently and knowingly waived his right to a hearing prior to the repossession of such personal property."

It is not clear whether the waiver permitted by S.C. Code §22-3-1360 is prohibited by the Credit Practices Rule. Section 444.2(1) prohibits cognovits, confessions of judgment, warrants of attorney "or other waiver of the right to notice and opportunity to be heard in the event of suit or process thereon." When a statute has both specific and general words associated together, the general words are restricted in meaning by the specific words. The South Carolina waiver does not operate similar to a cognovit or confession of judgment. It does not involve consenting in advance to a judgment. It is simply a method of repossessing collateral.

In discussing Louisiana's executory process, the Statement of Basis and purpose recognizes that "[t]o the extent that Louisiana executory process may involve the loss of any due process rights, the Commission lacks sufficient evidence to find that these rights are waived involuntarily or unknowingly." I suspect the Commission also lacks sufficient evidence with respect to the waiver provision of S.C. Code §22-13-1360.

2. Does the Credit Practices Rule prohibit a creditor from including a cross-collateral or future advance clause in a security agreement for purchase money household goods?

Section 444.2(4) prohibits lenders from taking a nonpossessory security interest in household goods other than a purchase money security interest. The Rule does not prohibit cross-collateral or future advance clauses; however, I am unsure whether it does prohibit such clauses in security agreements for purchase money household goods. If a security agreement for a purchase money household good includes a cross-collateral or future advance clause, the household good would secure debts other than the purchase money debt. Some courts do not give effect to cross-collateral and future advance clauses; however, some do.

3. Does the Credit Practices Rule prohibit a creditor from enforcing provisions in contracts consummated before 3/1/85 that will be prohibited after that date?

Many existing contracts have confessions of judgment and assignments of wages. Since those provisions were not considered unfair when the contracts were made, are they enforceable once the Rule becomes effective?

4. Can a creditor require that a revocation of a wage assignment be in writing and received by the lender a specified number of days before the revocation is given effect?

The requirement to have wage assignments revoked in writing will enable lenders to establish an orderly procedure for giving effect to revocations. Telephone messages are too easily lost or confused. A lender may also need a day or two to implement the revocation, particularly if it has branch offices or a large operation.

MAGISTRATES' COURTS

§ 22-3-1310

HISTORY: 1962 Code § 43-158; 1952 Code § 43-158; 1942 Code § 271; 1932 Code § 271; Civ. P. '22 § 227; Civ. P. '12 § 94; Civ. P. '02 § 85; 1870 (14) 88.

ARTICLE 13

PROCEEDINGS IN CLAIM AND DELIVERY

- 22-3-1310. Claiming immediate delivery of property by plaintiff.
- 22-3-1320. Affidavit of plaintiff in action of claim and delivery.
- 22-3-1330. Summons and notice of right to preseizure hearing in plaintiff's action of claim and delivery; order for seizure of property.
- 22-3-1340. Defendant's exceptions to sureties in bond or undertaking.
- 22-3-1350. Purpose of preseizure hearing; allowing claim for immediate possession; action shall be tried as others.
- 22-3-1360. Notice and opportunity for preseizure hearing required; waiver.
- 22-3-1370. Order restraining defendant from damaging, concealing or removing property.
- 22-3-1380. Determination upon affidavit showing danger of destruction or concealment.
- 22-3-1390. Service of copy of affidavit of waiver or probability of damage or concealment.
- 22-3-1400. Procedure when defendant cannot be found.
- 22-3-1410. Service of copy of affidavit, summons and notice; taking of property by constable.
- 22-3-1420. Taking property concealed in building or enclosure.
- 22-3-1430. Care of property taken by constable.
- 22-3-1440. Return of property to defendant upon filing written undertaking for delivery if delivery be adjudged.
- 22-3-1450. Claim to taken property by third person.
- 22-3-1460. Judgment in actions for claim and delivery.
- 22-3-1470. Execution on judgment.
- 22-3-1480. Judgment when property is not delivered to plaintiff or when defendant claims return.

§ 22-3-1310. Claiming immediate delivery of property by plaintiff.

The plaintiff in an action of claim and delivery before a magistrate may at the time of issuing the summons, but not afterwards, claim the immediate delivery of such property as herein provided.

HISTORY: 1962 Code § 43-171; 1952 Code § 43-171; 1942 Code § 257; 1932 Code § 257; Civ. P. '22 § 213; Civ. P. '12 § 80; Civ. P. '02 § 71; 1870 (14) 74; 1879 (17) 28; Const. Art. 5 §§ 20, 21.

Related Local Laws—

For local laws relating to Anderson County, see Local Law Index.

Cross references—

As to recovery of personal property generally, see §§ 15-69-10 to 15-69-210.

CASE NOTES

If the plaintiff does not claim immediate delivery, as authorized by this section [Code 1962 § 43-171], then he must make the proof by affidavit as required by Code 1962 § 43-172 but is not required to enter into an undertaking under Code 1962 § 43-173. *Dillard v Samuels*, 25 SC 318 (1886).

§ 22-3-1320. Affidavit of plaintiff in action of claim and delivery.

Before any process shall be issued in an action to recover the possession of personal property, the plaintiff, his agent or attorney, shall make proof by affidavit, showing:

(1) That the plaintiff is the owner or is entitled to immediate possession of the property claimed, particularly describing such property;

(2) That such property is wrongfully withheld or detained by the defendant;

(3) The cause of such detention or withholding thereof, according to the best knowledge, information and belief of the person making the affidavit;

(4) That such personal property has not been taken for any tax, fine or assessment, pursuant to statute, or seized by virtue of an execution or attachment against the property of the plaintiff or, if so seized, that it is exempt from such seizure by statute; and

(5) The actual value of such personal property.

HISTORY: 1962 Code § 43-172; 1952 Code § 43-172; 1942 Code § 257; 1932 Code § 257; Civ. P. '22 § 213; Civ. P. '12 § 80; Civ. P. '02 § 71; 1870 (14) 74; 1879 (17) 28; Const. Art. 5 §§ 20, 21.

CASE NOTES

Affidavit must state that value of property does not exceed one hundred dollars. But whether such statement is necessary in the circuit court on appeal has not been decided. *Williams v Irby*, 16 SC 371 (1872). See also, *Wright v Lee*, 108 SC 357, 94 SE 873 (1918).

Variance between affidavit and pleadings may be amended. *Ehrhardt v Breeland*, 57 SC 142, 35 SE 537 (1900).

Affidavits to show demand may be heard on appeal to circuit court.—On appeal the circuit court may hear affidavits to show demand before action of claim and delivery. *Burton v Laurens Cotton Mills*, 64 SC 224, 41 SE 975 (1902).

Cited in *Kelly v Kennemore*, 47 SC 256, 25 SE 134 (1896).

ATTORNEY GENERAL'S OPINIONS

Claim-and-delivery actions may be instituted and carried into effect lawfully by filing of affidavit as required by this section [Code 1962 § 43-172], by the issuance and service of magistrate's

summons setting the matter for hearing as provided in Code 1962 § 43-173, by hearing, by judgment, and by execution. 1971-72 Ops. Att'y Gen., No 3345, p. 180.

§ 22-3-1330. Summons and notice of right to preseizure hearing in plaintiff's action of claim and delivery; order for seizure of property.

(a) On receipt of such affidavit and an undertaking in writing, executed by one or more sufficient sureties, to be approved by the magistrate before whom such action is commenced, to the effect that they are bound in double the value of such property as stated in such affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff, the magistrate shall at the same time issue both a summons and a notice of right to preseizure hearing, with a copy of the undertaking and plaintiff's affidavit, directed to the defendant and to be served by the constable.

(b) The notice of right to a preseizure hearing so issued and served shall 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 defendant's right to continue in possession, but if the defendant fails to make timely demand for preseizure hearing, the constable will be directed to take the property described in the affidavit.

(c) The summons so issued and served will require the defendant to appear before the magistrate at a time and place to be therein specified, not more than twenty days from the date thereof, to answer the complaint of the plaintiff. The summons shall contain a notice to the defendant that in case he shall fail to appear at the time and place therein mentioned the plaintiff will have judgment for the possession of the property described in the affidavit with the costs and disbursements of the action.

(d) If the defendant fails to demand a preseizure hearing, or, if after such hearing the magistrate shall find that plaintiff's claim for immediate possession should be allowed, then the magistrate shall endorse upon the affidavit a direction to any constable of the county in which the magistrate shall reside, requiring such constable to take the property described therein from the defendant and keep it, to be disposed of according to law. For the endorsement in such affidavit the magistrate shall receive an additional fee of twenty-five cents, which shall be included in the costs of the suit.

HISTORY: 1962 Code § 43-173; 1952 Code § 43-173; 1942 Code §§ 257, 263; 1932 Code §§ 257, 263; Civ. P. '22 §§ 213, 1219; Civ. P. '12 §§ 80, 186; Civ. P. '02 §§ 71, 177; 1870 (14) 74, 80; 1879 (17) 28; Const. Art. 5 §§ 20, 21; 1972 (57) 3080.

Research and Practice References—

"Service of Process" in "Handbook of South Carolina Trial and Appellate Practice," 11 SCLQ, Supp. 17 (1959).

CASE NOTES

This section [Code 1962 § 43-173] is manifestly applicable to actions of claim and delivery only. *Kelly v Kennemore*, 47 SC 256, 25 SE 134 (1896); *Hasten Furniture Co. v Southern Ry.*, 82 SC 238, 64 SE 223 (1909).

There is no requirement that the undertaking to be given by a plaintiff shall be executed by the plaintiff; the only requirement is that "an undertaking, in writing executed by one or more sufficient sureties" to be approved by the magistrate, shall be delivered to the magistrate before he directs the constable to take possession of the property sought. *Marshall Bros.*

Furniture Co. v Drawdy, 184 SC 492, 193 SE 49 (1937).

Summons is fatally defective if it names a day for trial more than twenty days after its date. *Simmons v Cochran*, 29 SC 51, 6 SE 859 (1888). This case was distinguished in *State v Smith*, 38 SC 270, 16 SE 997 (1893), reaffirmed in *Kelly v Kennemore*, 47 SC 256, 25 SE 134 (1896).

It is immaterial whether the summons is addressed to the defendant or officer. *Bell v Pruit*, 51 SC 344, 29 SE 5 (1888).

Quoted in *Adkins v Moore*, 43 SC 173, 20 SE 985 (1895).

ATTORNEY GENERAL'S OPINIONS

Claim-and-delivery actions may be instituted and carried into effect lawfully by filing of affidavit as required by Code 1962 § 43-172, by the issuance and service of magistrate's summons

setting the matter for hearing as provided in this section [Code 1962 § 43-173], by hearing, by judgment, and by execution. 1971-72 Ops. Att'y Gen., No 3343, p 180.

§ 22-3-1340. Defendant's exceptions to sureties in bond or undertaking.

The defendant may, at any time after such service and at least two days before the return day of the summons, serve upon the plaintiff or upon the constable who made such service a notice in writing that he excepts to the sureties in the bond or undertaking and if he fail to do so all objection thereto shall be waived. If such notice be served, the sureties shall justify or the plaintiff shall give new sureties on the return day of such summons, who shall then appear and justify, or the magistrate shall order the property delivered to the defendant and shall also render judgment for defendant's costs and disbursements.

HISTORY: 1962 Code § 43-178; 1952 Code § 43-178; 1942 Code § 257; 1932 Code § 257; Civ. P. '22 § 213; Civ. P. '12 § 80; Civ. P. '02 § 71; 1870 (14) 74; 1879 (17) 28; Const. Art. 5 §§ 20, 21.

CASE NOTES

Waiver of irregularity or defect in undertaking by not excepting.—The objection that the magistrate did not endorse his approval on an undertak-

ing is waived by not excepting thereto. *Cromer v Watson*, 59 SC 488, 38 SE 126 (1901).

§ 22-3-1350. Purpose of pre seizure hearing; allowing claim for immediate possession; action shall be tried as others.

The purpose of the pre seizure hearing is to protect the defendant's use and possession of property from arbitrary encroachment, and to prevent unfair or mistaken deprivations of property. If the magistrate shall, after conducting the hearing, find that the plaintiff's claim for immediate possession is probably valid and the defendant has no overriding right to continue in possession of the property, then the magistrate may allow the claim for immediate possession and endorse the affidavit accordingly.

Whether the claim for immediate possession is allowed or not, the action commenced by the service of the summons shall be tried in all respects as other actions are tried in the magistrates' courts.

HISTORY: 1962 Code § 43-181; 1952 Code § 43-181; 1942 Code § 263; 1932 Code § 263; Civ. P. '22 § 219; Civ. P. '12 § 86; Civ. P. '02 § 77; 1870 (14) 80; 1972 (57) 3080.

§ 22-3-1360. Notice and opportunity for pre seizure hearing required; waiver.

No property shall be seized under the provisions of this article unless five days' notice and an opportunity to be heard have been afforded the party in possession as herein provided; *provided*, ~~if any person in possession of the personal property may waive the right to a pre seizure hearing, if the waiver is conspicuously displayed in the contract and includes the wording "waiver of hearing prior to immediate possession."~~ In order for the contractual waiver or any other waiver to be effective, the plaintiff by affidavit must show that the defendant has in writing by contract or separate written instrument voluntarily, intelligently, and knowingly waived his right to a hearing prior to the repossession of such personal property. The magistrate may order immediate delivery of the property to the plaintiff upon receipt of such affidavit.

HISTORY: 1962 Code § 43-185; 1972 (57) 3080.

§ 22-3-1370. Order restraining defendant from damaging, concealing or removing property.

The magistrate shall concurrently have served on the defendant, when immediate possession of the subject property is not being taken, an order restraining the defendant from damaging, concealing or removing such property. Upon proper showing that such order has been violated, the defendant shall be subject to a fine

§ 22-3-1370

MAGISTRATES AND CONSTABLES

not to exceed one hundred dollars or imprisonment for not more than thirty days.

HISTORY: 1962 Code § 43-186; 1972 (57) 3080.

§ 22-3-1380. Determination upon affidavit showing danger of destruction or concealment.

Upon a showing unto the magistrate supported by an affidavit containing facts sufficient to show that it is probable to believe that the property at issue is in immediate danger of being destroyed or concealed by the possessor of such property and particularly describing such property and its location, the magistrate shall make a determination as to whether or not the property may be immediately seized. *Provided*, that the holding of a pre-seizure hearing by the magistrate shall not be a condition precedent to such determination.

HISTORY: 1962 Code § 43-187; 1972 (57) 3080.

§ 22-3-1390. Service of copy of affidavit of waiver or probability of damage or concealment.

If either an affidavit showing that the defendant has waived his right to a pre-seizure hearing or an affidavit of probability of damage or concealment is filed, under the provisions of this article, a copy thereof shall be served on the defendant in lieu of serving him with notice of right to pre-seizure hearing.

HISTORY: 1962 Code § 43-188; 1972 (57) 3080.

§ 22-3-1400. Procedure when defendant cannot be found.

If it shall appear by the return of a constable that he has taken the property described in the plaintiff's affidavit and that the defendant cannot be found and has no last place of abode in the county and that no agent of defendant could be found on whom service could be made, the magistrate may proceed with the cause in the same manner as though there had been a personal service.

HISTORY: 1962 Code § 43-174; 1952 Code § 43-174; 1942 Code § 263; 1932 Code § 263; Civ. P. '22 § 219; Civ. P. '12 § 86; Civ. P. '02 § 77; 1870 (14) 80.

§ 22-3-1410. Service of copy of affidavit, summons and notice; taking of property by constable.

The constable to whom the affidavit, endorsement, notice of pre-seizure hearing and summons shall be delivered, shall, without delay, serve upon the defendant a copy of the affidavit, notice and summons, by delivering them to him personally, but, if he cannot be found, to the agent of the defendant in whose possession the

property shall be found and, if neither can be found, by leaving such copies at his place of business or the last or usual place of abode of the defendant with some person of suitable age and discretion. He shall forthwith make a return of his proceedings thereon and the manner of serving the documents to the magistrate who issued the summons. Upon the magistrate endorsing upon the affidavit a direction requiring the constable to take the property, the constable to whom the affidavit and endorsement is delivered shall forthwith take the property described in the affidavit, if he can find it in the county, and shall keep it in his custody.

HISTORY: 1962 Code § 43-175; 1952 Code § 43-175; 1942 Code § 257; 1932 Code § 257; Civ. P. '22 § 213; Civ. P. '12 § 80; Civ. P. '02 § 71; 1870 (14) 74; 1879 (17) 28; Const. Art. 5 §§ 20, 21; 1972 (57) 3080.

ATTORNEY GENERAL'S OPINIONS

City policemen may serve magistrates arrest warrants and civil papers. 1964-65 Ops. Att'y Gen., No 1800, p 44.

But they may not serve papers in claim and delivery actions. 1964-65 Ops. Att'y Gen., No 1800, p 44.

§ 22-3-1420. Taking property concealed in building or enclosure.

If the property, or any part thereof, be concealed in a building or enclosure the constable 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. If necessary he may call to his aid the power of his county.

HISTORY: 1962 Code § 43-176; 1952 Code § 43-176; 1942 Code § 261; 1932 Code § 261; Civ. P. '22 § 217; Civ. P. '12 § 84; Civ. P. '02 § 75; 1870 (14) 78.

ATTORNEY GENERAL'S OPINIONS

Section applicable to claim and delivery only.—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. 1963-64 Ops. Att'y Gen., No 1720, p 196.

And not to collection of rent by distraint.—Collection of rent by distraint on a tenant's property, authorized by Code 1962 §§ 41-151 et seq., does not come within the authority conferred by this section [Code 1962 § 43-176] and Code 1962 § 10-2513. 1963-64 Ops. Att'y Gen., No 1720, p 196.

"Concealed."—The word "con-

cealed" as used in this section [Code 1962 § 43-176] apparently does not mean hidden from view within the house. If the objects sought are within a building or house, even though in their normal places within such house, and demand has been made by the officer and refused by the owner or occupant, they are "concealed" within the meaning of the statute. 1963-64 Ops. Att'y Gen., No 1720, p 196.

"Public demand."—The "public demand" required of the officer does not mean that such demand must be posted on the courthouse door or advertised in a newspaper. It means, simply, that the officer must make every reasonable effort to make his presence

known to the occupants of the house and to demand surrender of the goods to him. 1963-64 Ops. Att'y Gen., No 1720, p 196.

Persons empowered to break residence buildings.—Only a sheriff or one of his duly appointed and qualified (regular) deputies, and a constable of the county, in claim and delivery actions arising out of magistrate's court, are empowered to break residence buildings under this section [Code 1962 § 43-176]. No "special" deputy or constable has the authority, and neither the sheriff nor the magistrate may appoint anyone specially to exercise this authority. 1963-64 Ops. Att'y Gen., No 1720, p 196.

Prerequisites for breaking and entering.—Before breaking and entering, an officer must make his presence and business known to the occupants and must demand that such property be given over to him. Only after refusal of such demand may he break and enter. 1963-64 Ops. Att'y Gen., No 1720, p 196.

A sheriff, a regular deputy sheriff, or a magistrate's constable may break open the door or window of a residence building to gain admittance to seize specified personal property in claim and delivery proceedings if entrance can be gained in no other reasonable manner. 1963-64 Ops. Att'y Gen., No 1720, p 196.

If an officer is unable to find anyone at home, or the occupants fail to answer his knocks and hallooing, on the second or subsequent trip, with every reasonable effort being made each time to make his presence known to the occupants, he is empowered to break open a door or window and take possession of the goods without further demand or notice. 1963-64 Ops. Att'y Gen., No 1720, p 196.

An officer must act reasonably throughout the entire proceeding. 1963-64 Ops. Att'y Gen., No 1720, p 196.

And he must use no more force than is necessary to break and enter. 1963-64 Ops. Att'y Gen., No 1720, p 196.

§ 22-3-1430. Care of property taken by constable.

When a constable shall have taken property as in this article provided, he shall keep it in a secure place and deliver it to the party entitled thereto, upon receiving his lawful fee for taking the property and his necessary expenses for keeping it.

HISTORY: 1962 Code § 43-177; 1952 Code § 43-177; 1942 Code § 262; 1932 Code § 262; Civ. P. '22 § 218; Civ. P. '12 § 85; Civ. P. '02 § 76; 1870 (14) 79.

§ 22-3-1440. Return of property to defendant upon filing written undertaking for delivery if delivery be adjudged.

At any time before the return day of the summons the defendant may, if he has not excepted to the plaintiff's sureties, require the return of the property to him upon giving to the plaintiff and filing with the magistrate a written undertaking, with one or more sureties who shall justify before the magistrate on the return day of the summons to the effect that they are bound in double the value of the property, as stated in plaintiff's affidavit, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. If such return be not required before the return day of the summons the property shall be delivered to the plaintiff.

HISTORY: 1962 Code § 43-179; 1952 Code § 43-179; 1942 Code § 257; 1932 Code § 257; Civ. P. '22 § 213; Civ. P. '12 § 80; Civ. P. '02 § 71; 1870 (14) 74; 1879 (17) 28; Const. Art. 5 §§ 20, 21.

§ 22-3-1450. Claim to taken property by third person.

If the property taken be claimed by any other person than the defendant or his agent and such person shall make affidavit to his title thereto and right to the possession thereof, stating the grounds of such right and title, and serve such affidavit upon the constable, the constable shall not be bound to keep the property or deliver it to the plaintiff unless the plaintiff on demand of him or his agent shall indemnify the constable against such claim by an undertaking executed by two sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property as specified in the affidavit of the plaintiff and are freeholders and householders of the county. No claim to such property by any other person than the defendant or his agent shall be valid against the constable unless made as aforesaid. And notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity.

HISTORY: 1962 Code § 43-180; 1952 Code § 43-180; 1942 Code § 263; 1932 Code § 263; Civ. P. '22 § 219; Civ. P. '12 § 86; Civ. P. '02 § 77; 1870 (14) 80.

CASE NOTES

Defendant cannot defeat action by showing title in third party.—In a claim and delivery proceeding the defendant cannot defeat the action by showing title in a third party. *Rogers v Felder*, 98 SC 178, 82 SE 436 (1914).

§ 22-3-1460. Judgment in actions for claim and delivery.

The judgment for the plaintiff may be for the possession, the recovery of the possession or the value thereof in case a delivery cannot be had and for damages for the detention. If the property has been delivered to the plaintiff and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof in case a return cannot be had and damages for taking and withholding the property.

HISTORY: 1962 Code § 43-182; 1952 Code § 43-182; 1942 Code § 263; 1932 Code § 263; Civ. P. '22 § 219; Civ. P. '12 § 86; Civ. P. '02 § 77; 1870 (14) 80.

Cross references—

As to judgment when property not delivered to plaintiff, see § 22-3-1480.

CASE NOTES

Judgment may be given for the value of the property though the demand is only for its recovery and damages for its detention. *Joplin v Carrier*, 11 SC 327 (1879).
But not where party entitled to gen-

eral damages.—A judgment for the value of the property so demanded cannot be given in a case where the party is entitled to general damages. *Joplin v Carrier*, 11 SC 327 (1879).

Plaintiff on appeal may elect to treat action as one for damages.—Where there are proper allegations the plaintiff may on appeal, in the circuit court, elect to treat the action as one for damages. *Williams v Irby*, 16 SC 371 (1882).

Verdict is sufficient if it fixes right of defendant to deliver property.—A verdict in an action of claim and delivery fixing the right of the plaintiff to have

the property, or the value thereof, and the right of the defendant to deliver the property rather than pay the value if he so choose, is in full compliance with this section [Code 1962 § 43-182]. *Bossard v Vaughn*, 68 SC 96, 46 SE 523 (1904).

A verdict may be referred to the pleadings for a more particular description of the property. *Bossard v Vaughn*, 68 SC 96, 46 SE 523 (1904).

New trial is the remedy where verdict is not in proper form.—Where the verdict is not in proper form, the trial justice cannot change it; a new trial is the remedy. *DuBose v Armstrong*, 29 SC 290, 6 SE 934 (1888).

§ 22-3-1470. Execution on judgment.

An execution shall be issued on any such judgment and if the judgment be for the delivery of the possession of personal property it shall require the officer to deliver the possession of such property, particularly describing it, to the party entitled thereto and may, at the same time, require the officer to satisfy any costs or damages recovered by the judgment out of the personal property of the party against whom it was rendered, to be specified therein, if a delivery thereof cannot be had. The execution shall be returnable within sixty days after its receipt by the officer to the magistrate who issued it.

HISTORY: 1962 Code § 43-183; 1952 Code § 43-183; 1942 Code § 263; 1932 Code § 263; Civ. P. '22 § 219; Civ. P. '12 § 86; Civ. P. '02 § 77; 1870 (14) 80.

§ 22-3-1480. Judgment when property is not delivered to plaintiff or when defendant claims return.

In all actions for the recovery of the possession of personal property, as herein provided, if the property shall not have been delivered to the plaintiff or the defendant by answer shall claim a return thereof, the magistrate or jury shall assess the value thereof and the injury sustained by the prevailing party by reason of the taking or detention thereof and the magistrate shall render judgment accordingly, with costs and disbursements.

HISTORY: 1962 Code § 43-184; 1952 Code § 43-184; 1942 Code § 263; 1932 Code § 263; Civ. P. '22 § 219; Civ. P. '12 § 86; Civ. P. '02 § 77; 1870 (14) 80.

Cross references—

As to verdict and judgment in general, see § 22-3-1460.

CASE NOTES

Judgment failing to declare value of property awarded void.—A judgment in a claim and delivery proceeding before a magistrate which merely awarded the plaintiff the property in dispute without declaring the value of the property as provided for under this section (Code 1962 § 43-184) is void. *Yarborough v Dickerson*, 152 SC 168, 129 SE 136 (1925). See also *Wilkins v Willimon*, 128 SC 509, 122 SE 503 (1924).