South Carolina Bench Book
for
Magistrates and Municipal Court Judges

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A.
Introduction to Civil Law

1. Introduction to Civil Law

NOTE: The Municipal Judge Has No Civil Jurisdiction, Therefore, The Following Section (Pages II-1, et. Seq.), Is Inapplicable To Municipal Judges.

The law of civil procedure for magistrates represents an outgrowth of the common law as supplemented today by several sources. One very basic source is Article V, Section 26 of the S.C. Constitution which establishes the system of magistrates courts and generally prescribes its jurisdiction. The U.S. Constitution is, of course, the document which defines the basic concepts and confines within which all our laws develop.

In addition to these basic sources, magistrates should become familiar, and in fact fluent, with the Administrative and Procedural Rules for Magistrate's Courts, (SCRMC), and with the statutes relating to civil procedure which appear in our Code of Laws. The basic statutory authority for magistrates' civil procedure may be found in Volume 9, Title 22, beginning at S.C. Code Ann. § 22-3-10. This, the more specific law applicable to magistrates courts, is supplemented by the general statutes of civil law for the Circuit Courts which are found in Volume 7, Title 15. A word of caution, however, is necessary here as only certain parts of Title 15 are applicable to the magistrates courts. (See § 22-3-110). From time to time, the General Assembly may amend or repeal these laws. Reference should also be made to the South Carolina Rules of Civil Procedure (SCRCP), which are the rules that govern civil procedure in the Circuit Courts. Rule 81, SCRCP, provides that those rules shall apply insofar as practical in magistrate's court to the extent they are not inconsistent with the specific statutes and rules that govern magistrate's court.

In order to see which parts of Title 15 and/or the South Carolina Rules of Civil Procedure may be adopted for use by magistrates, and when the situation arises, what procedure magistrates should follow where no procedure is apparent from Title 22, we depend upon additional sources, such as the case law and the Opinions of the Attorney General. At the end of many of the statutory sections in our Code, one may see a heading titled "Case Notes." This is a listing of the most recent case law relevant to that statute and can often be consulted for further explanation of the statute.

Because our Code of Laws are supplemented over long intervals, recent cases of importance will usually be made available to magistrates by the Office of Court Administration.

In the past, an individual was not allowed to institute a civil action if a criminal action was initiated for Malicious Injury to Animals and Other Personal Property, § 16-11-510, or Malicious Injury to Real Property, §16-11-520, because the civil and criminal remedies merged pursuant to § 15-1-150. With the adoption of the South Carolina Rules of Civil Procedure (SCRCP) and the repeal of § 15-1-150, a person is no longer prevented from pursuing both civil and criminal remedies for injuries to personal or real property.

B.
Magistrate Law in Civil Actions

1. Jurisdiction

In South Carolina, jurisdiction, or the basic authority of a judge to hear and exercise judgment of a matter, is based upon three considerations: territorial jurisdiction, subject matter jurisdiction, and the amount in controversy.

Territorial jurisdiction for each magistrate extends throughout the county in which he is appointed in both civil or criminal matters. Before the opinion of the S.C. Supreme Court in Ex re Daniel R. McLeod v. Roger A. Crowe, 272 S.C. 41, 249 S.E.2d 772 (1978), district jurisdiction between magistrates was allowed, but as of McLeod v. Crowe, supra., all magistrates now constitutionally possess "uniform county wide jurisdiction."

To understand the latter two determinations of jurisdiction, subject matter jurisdiction and amount in controversy, one must look to S.C. Code Ann. §§ 22-3-10, and 22-3-20. Section 22-3-10, as limited by § 22-3-20, sets out magisterial jurisdiction over twelve areas of civil subject matter as follows:

1. Actions on contracts for the recovery of money, where the claim does not exceed $7,500.00;

2. Actions for damages for injury to rights pertaining to the person, or personal or real property, where the damages do not exceed $7,500.00;

3. Actions for a penalty, fine or forfeiture, not to exceed $7,500.00;

4. Actions commenced by attachment of property, as provided by statute, where debt or damages do not exceed $7,500.00;

5. Actions upon a bond conditioned for the payment of money, not exceeding $7,500.00, whether the money is due in sum total or in installments;

6. Actions upon a surety bond taken by the magistrate, when penalty or amount claimed does not exceed $7,500.00;

7. Actions upon a judgment rendered in magistrate's court when it is not prohibited by the South Carolina Rules of Civil Procedure;

8. Taking and entering judgment on the confession of a defendant in the manner prescribed by law when the amount confessed does not exceed $7,500.00.

9. Actions for damages or for fraud in the sale, purchase, or exchange of personal property, not to exceed $7,500.00;

10. All landlord and tenant matters, as well as those included in Chapter 33 through 41 of Title 27, encompassing matters of leasehold estates, rent, ejectment of tenants and undertenants of life tenants;

11. Actions to recover the possession of personal property, whose stated value does not exceed $7,500.00;

12. In all actions provided for in this section when a filed counterclaim involves a sum not exceeding $7,500.00.

13. In interpleader actions arising from real estate contracts for the recovery of earnest money, only if the sum claimed does not exceed $7,500.00.

14. In actions for damages arising from a person’s failure to return leased or rented personal property within 72 hours after the expiration of the lease or rental agreement, such damages to be based on the loss of revenue or replacement value of the property, whichever is less, if the damages claimed do not exceed $7,500.00; however, the lease or rental agreement must set forth the manner in which the amount of the loss of revenue or replacement value of the item leased or rented is calculated.

It should additionally be noted that magistrates have limited jurisdiction over mechanics' liens (§ 29-5-130), agricultural liens (§§ 29-13-80 and 29-13-90), repair or storage liens (§ 29-15-10), and animal owner's liens (§ 29-15-50).

In most of the above matters, for the magistrate to have jurisdiction over the amount of the contract, bond or judgment, the extent of damages, or the value of the property or dispute must not exceed the $7,500.00 limitation imposed by § 22-3-10. In cases involving liens, the magistrate's jurisdictional dollar amount may be further restricted by the lien statute itself. Section 22-3-20 further limits a magistrate's jurisdiction by prohibiting his hearing civil cases in which the State is a party, except actions for penalties not exceeding $100, and for disputes as to title in real property matters except as provided in §§ 22-3-1110 - 22-3-1180. Jurisdiction may not be waived or conferred upon the magistrate by consent of the parties or by order of a higher court.

As a rule, magistrates need not make a determination themselves of the amount in controversy for the purpose of determining their jurisdiction, since jurisdiction is determined by the amount claimed by the plaintiff and not the amount actually due. It should also be understood that if a defendant makes a counterclaim against the plaintiff in an amount in excess of $7,500.00, then the initial claim and counterclaim must be transferred to the Court of Common Pleas for that judicial circuit as required by § 22-3-30.

2. Venue

Venue and jurisdiction are easily confused, but are in reality terms of quite different meaning. "Jurisdiction" of the court refers to the inherent power of the court to hear a case, whereas "venue" describes the particular county in which a court with jurisdiction may hear and determine an action. Once the propriety of jurisdiction, as discussed previously, has been determined, the magistrate must turn his attention to venue. Generally, for venue to be proper, the action must have been brought before the magistrate with territorial jurisdiction over the area of the residence of at least one defendant. (Rule 4, SCRMC). Remembering that a magistrate's territorial jurisdiction may only be county-wide, the residence of the defendant must fall within that magistrate's territorial responsibility for the action to be properly begun. The defendant's place of residence, and not the occurrence of the matters in controversy, is generally the key to venue in civil cases. (See also §§ 15-7-10 and 15-7-20). However, §15-7-30 was amended in 2005 to allow that a case may not only be filed in the defendant's place of residence, but also in the county where the most substantial part of the alleged act or omission giving rise to the cause of action occurred. By opinion dated September 22, 2006, the Attorney General stated that in the opinion of that Office, "as to any conflict between Rule 4 of the Magistrate's Court Rules and § 15-7-30, it appears that the statute should probably be considered as prevailing." While a civil filing in a county where the defendant does not reside may be problematic in

terms of service and summoning witnesses, such filings should be accepted.

The change of venue statute, § 22-3-920, provides the means by which either party in a civil action, believing for a substantial reason that he would be unable to secure a fair trial from the magistrate before whom the matter is to be heard, may have his case moved to another magistrate nearby. This section requires that the party seeking the change of venue give the opposing party two days notice of his intention to apply for change, except where the moving party can show that facts to warrant the change were discovered too late to permit such notice.

The party seeking the change must next file an affidavit with the magistrate before whom the case was to be heard stating the applicant's belief that he cannot get a fair trial before that magistrate, and setting forth sufficient reasons for such a belief. To satisfy this requirement, the reasons must be set forth with definiteness and certainty - a mere opinion is not sufficient.

Once the sufficiency of the affidavit is determined, such that belief that a fair trial cannot be obtained is justified, a change of venue is mandatory, (Browning Manufacturing Co. v. Brunson, 187 S.C. 278, 197 S.E. 311 (1938)), and all the papers relating to the action should be turned over to the nearest magistrate in the county who is not disqualified from hearing the case, so that he may proceed as if the action had been originally filed with him. Section 22-3-920 points out specifically that only "one such transfer shall be allowed each party in any case." Changes of venue may be sought for a variety of reasons, from emotional causes of action preventing the drawing of an impartial jury to the personal knowledge or involvement of the magistrate before whom the action was brought, but in every case, the change should only be granted where reasons sufficient to justify a belief that a fair trial is not possible are alleged in the affidavit.

3. Statute of Limitation

Statutes of Limitations are legislative enactments which prescribe the time period within which actions must be brought in certain causes of action, or the right to maintain that action is lost. (§ 15-3-20). The legislative intention behind such enactments is to insure that certain causes of action are litigated within reasonable periods of time as dictated by the statutes. Beginning with § 15-3-20 and encompassing the entire Chapter 3, of Title 15, are found the statutes pertaining to Limitation of Civil Actions, which are made applicable to magisterial civil procedure by § 22-3-110, as previously mentioned. It is most important to note that the claiming of a statute of limitation is generally an affirmative defense, which the defendant must plead, and prove, in response to the plaintiff's complaint; and should the defendant so fail to claim the statute of limitations in his answer, no cognizance of it may be taken. Gattis v. Chavez, 413 F.Supp. 33 (S.C. 1976). (See also, S.C. Rules of Civil Procedure).

A determination of when the statute of limitation period begins to run, and by what actions of the plaintiff the running of the period is tolled or frozen so that the plaintiff preserves his right to maintain the action, is essential to the consideration of a statute of limitation. Sections 15-3-20 through 15-3-150 pertain to these questions. The statutory period of the statute of limitation begins to run on the day after the cause of action arose. Magistrates should examine critically any action in which a long period of time intervenes between the arising of the cause of action and the commencement of the action by the plaintiff.

Rule 3, SCRCP states that a civil action is commenced by filing and service of a summons and complaint. Rule 3(b) provides “[for] the purpose of tolling any statute of limitations, an attempt to commence an action is equivalent to the commencement thereof when the summons and complaint are filed with the clerk of court and (1) delivered for service to the sheriff of the county in which the

defendant usually resides. Delivery to a constable does not toll the statute. It must be delivered to the sheriff of the county in which the defendant usually or last resided, or if a corporation be the defendant, to the sheriff of the county in which any person designated by statute to accept service usually or last resided; provided that actual service must be accomplished within a reasonable time thereafter, or (2) actually served with 120 days after filing with the clerk of court."

The sections concerning the statute of limitation time periods as to specific actions are in § 15-3-310 through 15-3-680. Some specific sections are:

1. Actions for trespass upon or damage to real property, actions for the specific recovery of personal property or for the taking, detaining, or injuring of any goods arising on contract must be commenced within three years, (§ 15-3-530).

2. Actions for libel, slander, assault, battery, or false imprisonment must be commenced within two years, (§ 15-3-550).

4. Parties

In all civil actions in magistrates' courts, the party beginning a case is known as the plaintiff and the party defending against the plaintiff's claim is the defendant. The SCRMC and Rule 17 SCRCP, sets out the body of rules applicable to all such matters.

Of special note is the ability of the magistrate to appoint a guardian ad litem pursuant to Rule 17(d)(1), SCRCP, in cases brought in the magistrate's court where such appointment is necessary. The appointment of a guardian is necessary, for example, where an infant or a person in prison is a party to an action. There are other instances, however, and if the question arises, the Rules of Civil Procedure should be examined.

5. Rules of Evidence

The South Carolina Supreme Court has adopted the South Carolina Rules of Evidence. The Rules of Evidence are those rules by which matters of fact or allegation are established in all legal proceedings. The Rules of Evidence for courts in South Carolina are supplemented by the provisions found in Title 19 beginning with § 19-1-10. These rules and sections designate the accepted types of evidence, such as oral testimony, evidence in the form of documents, public or private records or writings, and certain types of exhibits. The rules control the development of evidence from the various possible sources, including pretrial statements or admissions, oral or written testimony or other admissible evidence, as well as any inferences or presumptions permitted to be drawn from that developed at trial.

The S.C. Supreme Court has also adopted the South Carolina Rules of Civil Procedure (SCRCP) which are made applicable to magistrate courts pursuant to Rule 81, SCRCP. These sections and rules, as supplemented by South Carolina case law as well as traditional notions of evidence law provide all our Courts with guidance in evidentiary matters.

C.
Civil Procedure in Magistrates' Courts

The technical rules of procedure applicable to other courts in the state's uniform court system are not imposed upon the courts of magistrates. The permitted use of oral pleadings and oral notice is indicative of the informality of the magisterial system which is one of its highest virtues as a court of small claims resolution. Even on appeal to the circuit court, the magistrate's action is required "to give judgment to the justice of the case, without regard to technical errors and defects which do not affect the merits."

1. The Pleadings

In the magistrate's court, there are two types of pleadings - the complaint by the plaintiff and the answer by the defendant. (Rules 5 and 7, SCRMC and S.C. Code Ann. § 22-3-150). The complaint should state, in a short and plain manner, the facts constituting the cause of action, (Rule 5 and § 22-3-160) and its sufficiency is not viewed with a high degree of technicality. The answer may contain a denial of the complaint or of any part and also a notice, in a plain and direct manner, of any facts constituting a defense or counterclaim. (§ 22-3-170).

Any of the pleadings may be orally given or presented in writing. A defendant may even answer orally a complaint made in writing to the magistrate. However, no person should be allowed to make a pleading over the telephone, i.e., their personal appearance to make their oral statement should be required. Where a pleading is made orally, it must be reduced to writing, with the assistance of the court, if the plaintiff or defendant requests such assistance. (Rules 5 and 7, SCRMC). The papers should then be filed with the magistrate.

2. Summons and Service Process

After all pleadings have been satisfactorily filed by the plaintiff with the magistrate, a summons should be drawn up by the magistrate. Civil actions are initiated in the magistrates' court, like circuit courts, by the service of the complaint and a summons upon the defendant(s). The summons, required by general constitutional theories of proper notice, must give the defendant clear notice of the time within which he must make a return to the complaint or suffer a default. In some cases of unliquidated demands (discussed elsewhere), additional material may be filed by the plaintiff with the magistrate and served upon the defendant in order to expedite matters in the event of a defendant's default. (§ 22-3-270). The form of summons appearing at Rule 19 of the SCRMC is sufficient, and is recommended. (See Rule 6, SCRMC).

3. Service of Process

Service of the summons and complaint, often referred to as process, may be by personal service upon the defendant or by publication, or by mail as provided in Rule 6, SCRMC. The Rules and the statutory provisions of each of these procedures should be consulted by the magistrate. (Consult Rule 4, SCRCP; Rule 6, SCRMC and §§ 22-3-110, 130 and 140). "Rule 4, SCRCP, serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of a reasonable notice of the action. Roche v. Young Bros., 318 S.C. 207, 456 S.E.2d 897 (1995).

If personal service cannot be made on the defendant, Rule 4(d) SCRCP allows service to be made upon a person of discretion (of suitable age and reliability) who resides at the defendant's residence or to an agent authorized by appointment or by law to receive service of process. (§ 22-3-130). This service upon a person of discretion may be done except in cases of service upon corporations or

business entities, persons of unsound mind, persons incarcerated for criminal offenses or minors. For service in these instances, magistrates should consult the statutes beginning at § 15-9-210 for the applicable procedure.

Regarding personal service, the South Carolina Supreme Court has held that exacting compliance with the rules is not required to effect service of process. Rather, the court must inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings. A presumption of proper service exists when the rules governing service are followed. Roche v. Young Bros., 318 S.C. 207, 456 S.E.2d 897 (1995). In a recent decision, the Court considered whether service of process was proper where a process server who had repeatedly attempted to serve process and during the attempt at issue believed the individual was inside the residence, never saw or communicated with the individual, confirmed the defendant's car was at the residence, called out his intent to leave the papers, then posted the process on the front door. The court held that the process server is not required to ram the documents down a defendant's throat and personal service of process "should not become a gang of wiles and tricks." However, there must be something more than a mere suspicion of a defendant's refusal to accept the summons and complaint before we are willing to find a defendant was sufficiently served with process by means other than strict compliance with the Rules. BB&T v. Taylor, 369 S.C.548, 633 S.E.2d 501 (2006)

If service upon the defendant cannot be accomplished by personal service, or if no person of discretion may be found at his residence, then service may be made by publication upon the order of the magistrate. (§ 22-3-140). A magistrate may order service by publication on an absent defendant pursuant to § 15-9-710, where that defendant has not been found within the State after a search of due diligence. The fact of the "diligent" search must be alleged in an affidavit. The magistrate must find the existence of a cause of action against the defendant, and that the situation is one of the types enumerated in § 15-9-710. The order of publication of the magistrate should direct the publication to be made in the one newspaper, as designated by the magistrate, most likely to give notice to the person to be served, and to appear once a week for not less than three weeks. It seems reasonable that the magistrate should operate in a manner consistent with the terms of § 15-9-740, the general statute concerned with the technical aspects of service by publication and in addition to the publication, require a copy of the summons and complaint be sent to the last known address of the party to be served. Note that proof of service by publication may also be made by affidavit before a notary public that the appropriate notice has been published.

Service by mail may be made by mailing a copy of the summons, complaint, and any appropriate attachments to the defendant at his last known address by certified mail, restricted delivery, return receipt requested, showing to whom and date delivered. The envelope and the return receipt shall be stamped with the docket number of the case. The "Receipt For Certified Mail" shall state the name and address of the addressee and the date of mailing and shall be attached to the original summons, and filed by the court. Reception by the court of the signed return receipt shall constitute proof of service on the indicated delivery date. The specified time period for answering and counterclaiming shall begin to run on the first day after the date of delivery as shown on the return receipt. The time of return if service is made by mail shall be double the time required by personal service. Rule 6(b), SCRMC.

In, Patel v. Southern Brokers, LTD., 277 S.C. 490, 289 S.E.2d 642 (1982), the summons and complaint were sent to the defendant by certified mail, return receipt requested. The plaintiff could not enter proof of service because the postal service returned the unopened envelope has refused. The Court found a defendant could not avoid processed by refusing to accept registered mail known to contain a summons and complaint. Once the documents were made available to the defendant, "the mailman was not required to ram them down the defendant's throat." The court concluded the

defendant had been served with process and the lower court had jurisdiction over the defendant.

4. Time of Return by Defendant

The summons and complaint should be served upon the defendant as soon after issuance as is practicable, and the summons should specify the time during which the defendant must make his return to the complaint in the form of an offer of judgment, demurrer to the complaint, or an answer. The summons should require the defendant to make his return, by the same methods prescribed for making a complaint, within thirty (30) days from the first day after the date of service. If the matter involves an amount of $25 or less, the defendants return may be required within five (5) days from the first day after the date of service. (Rule 6, SCRMC and S.C. Code Ann. § 22-3-120).

5. Offer of Judgment

If the defendant makes an offer of judgment of an amount to be adjudged against him, in writing and prior to answering the complaint, the plaintiff must consider the offer and accept or reject it. Notice of acceptance only need be given, and must be made to the magistrate in writing, whereupon the acceptance and offer together should be filed in the docket and judgment rendered accordingly. If the offer is rejected, no notice of rejection need be given. If the plaintiff should fail to recover an amount in excess of the defendant's offer, the plaintiff should be liable to the defendant for costs accruing subsequent to the offer. (§ 22-3-220).

6. Demurrer to the Complaint

The defendant may choose to demur to the complaint or any part of it on the grounds that it is not sufficiently clear or explicit to enable him to understand it, or because it contains no cause of action even if taken as factual. If the magistrate finds the demurrer to be well founded, the magistrate should order the plaintiff to amend the complaint or have it disregarded by the court. (§ 22-3-180).

7. Answering the Complaint

If the defendant chooses to answer, whether in writing or orally (which must be reduced to writing), he must do so within the time period prescribed in the summons (30 days) or he may be held in default. This time period is calculated by excluding the first day (day of service) and including the last day. If the last day is a Saturday, Sunday, or legal holiday, the defendant has until the next day which is not a Saturday, Sunday, or legal holiday. (Rule 6(a), SCRCP).

The answer, like other pleadings in the magistrates court may be made orally, or in writing. (§ 22-3-190). If made orally, it must be made personally before the magistrate and must be reduced to writing, with the assistance of the magistrate, if the court determines such assistance is necessary. (Rule 7, SCRMC) Magistrates should not allow answers or complaints or other pleadings to be made by telephone. The answer may contain a denial of the complaint or any part of it, but must contain notice of facts constituting any defense.

The defendant, at the time of making his answer or at any time thereafter but within the time prescribed in the summons, may assert a counterclaim which arises out of the same transaction or occurrence as the plaintiff's complaint. (Rule 8, SCRMC and § 22-3-170). Whether made in the answer or thereafter, the counterclaim may be made in writing or orally (and reduced to writing), as any other pleading and must contain facts sufficient to support its assertion.

In the case of any defense or counterclaim which involves an account or an instrument for the

payment of money only, a set-off against the recovery of the other party may be claimed by delivery of the account or instrument to the court within the time periods prescribed previously. (§ 22-3-280).

8. Objection to Jurisdiction

An objection to the jurisdiction of a magistrate may be made in the defendant's answer or at any time thereafter. An objection to the jurisdiction of a magistrate may not be lost by failure to assert it, and the failure of a defendant to appear at trial or a hearing may not be deemed a waiver of objection to the magistrates' jurisdiction. The defendant may, however, waive his jurisdictional objection by action from which an intentional waiver could be inferred. (§ 22-3-210).

9. Setting the Trial Date

Upon the making of the answer by the defendant, or upon the failure of the defendant to answer or otherwise make a return to the magistrate within the prescribed time, the magistrate should set the time and place of trial and serve notice of the same on both parties to the action. Any answer or counterclaim made by the defendant within the proper time should be served upon the plaintiff along with the notice of trial.

10. Exhibition of Accounts

Upon the joinder of the issue (the state at which the pleadings of one party deny the facts alleged by the other) the magistrate may require either party, at the request of the other, to exhibit his account or state its nature at that or some other specified time. If that party should default, he is precluded from giving evidence of any such detail not exhibited or stated when requested. (§ 22-3-290).

11. Amendments to Pleadings

Pleadings may be amended at any time before or during the trial, or upon appeal, when the allowance of the amendment would promote "substantial justice." If the amendment is made after the joining of the issue, which is the point of the proceedings when the truth is asserted to be so by one party and denied by the other, then the court may grant a postponement. The postponement should only be granted when the court, upon oath of the adverse party, deems it necessary. (§ 22-3-200). There is no requirement in the statutes that requires notice to or service of the amendment on the adverse party, but magistrates should require this in fairness to the parties. Holladay v. Hodge, 84 S.C. 91, 65 S.E. 952 (1909).

In the case of court-ordered amendment upon the sustaining of a demurrer, a party's failure to amend results in the exclusion of the defective pleading. (§ 22-3-180). Also, the court in its discretion may require the payment of costs to the adverse party as a condition of allowing the amendment. (§ 22-3-200).

12. Default Judgments and Dismissals

Either party to a civil action (plaintiff or defendant) may be held in default and judgment awarded against him for his delinquency. A defendant may be held in default if he fails to file an answer to the plaintiff's complaint within the time period prescribed in the summons. That time period is normally thirty (30) days. However, if the amount claimed is $25 or less, the time period is five (5) days. If the defendant fails to file an answer to the complaint within the time period, the court should sign an order of default and notify the plaintiff. If the suit is for a liquidated sum or if the suit is for the balance on an account and a signed notarized statement of account was attached to the complaint served upon the

defendant, the court should grant the plaintiff a default judgement. (§ 22-3-270 and Rule 10, SCRMC).

A liquidated account is where there is no dispute about the amount that is due from the defendant to the plaintiff, such as a suit on a note or a suit on an agreement for a specified sum. An example would be a note for $100 plus interest at 12% per annum from January 1, 1998. The amount due would be $100 plus $1 per month for each month from January until the plaintiff is awarded judgement. In those situations, the amount being sued for is considered "liquidated" and no hearing needs to be held to determine the amount in which the plaintiff is entitled.

A suit on an account is where the defendant had a charge account with the plaintiff or where the plaintiff sold the defendant goods or services. The notarized statement of account should itemize all charges to the account and all credits to the balance being sued on. An example of credits that should be shown are partial payments made by the defendants. The statement of account must be signed by the plaintiff and his signature must be notarized (See FORMS section of the Bench Book).

In unliquidated suits where the amount being sued for is not readily ascertainable and must be determined by the court, a damage hearing must be held when the defendant is in default. An example of this is where the defendant has damaged the plaintiff's automobile. The amount of those damages is not already established and, therefore, the plaintiff must appear at the damage hearing and prove the amount of his damages.

If the defendant has been placed in default, a damage hearing has been set for the plaintiff to come in and prove his damages, and the plaintiff fails to appear at the damage hearing after due notice, the plaintiff's complaint should be dismissed.

Likewise, if a defendant has filed an answer but fails to appear at the trial, then the trial should proceed without the defendant and the plaintiff would be permitted to prove his damages or claim against the defendant without the defendant having the chance to dispute the plaintiff's claims.

In cases where a defendant has been served, failed to file an answer within the prescribed time, placed in default, and the suit is for an unliquidated sum, the court must arrange a damage hearing for the plaintiff to prove the amount of his damages or claim. The court should notify the defendant and the plaintiff of the date and time of that hearing. The defendant is entitled to attend the hearing if he so desires. If the defaulting defendant appears at the damage hearing, he is not entitled to put forth any evidence or testimony disputing liability to the plaintiff. A defaulting party's participation at a damage hearing is limited to objecting to evidence and cross-examining plaintiff's witnesses.

If at the time of filing the complaint, a plaintiff requests that the court send him a copy of the affidavit of service of the complaint on the defendant, the court should send a copy of the affidavit of service to the plaintiff as soon after the complaint is served as possible. When a plaintiff is represented by an attorney, the attorney will generally use the copy of the affidavit of service to determine if the defendant has filed an answer within the prescribed time. If the defendant does not file an answer within that time, the attorney will then forward an affidavit of default to the court. If the amount claimed is for liquidated damages or is a suit on an account with a notarized statement of account attached, he should also forward an order of default judgment which could be signed by the Court and filed.

A notice of hearing should not be attached to the summons and complaint when it is served. At this point of the case, the court does not know if the defendant will answer and, therefore, whether a hearing is necessary. A hearing should not be set and a notice of hearing sent to the parties until the defendant has filed an answer with the court, or has failed to file an answer within the prescribed time

and placed in default by the Court. This enables the plaintiff, when coming to the hearing, to know if the defendant is contesting the plaintiff's claim and, if so, what the basis for the defendant's challenge to the plaintiff's claim is, whether the defendant is making a counterclaim against the plaintiff, and what proof the plaintiff will need to bring to trial.

In situations where a defendant has filed an answer and the matter will have to be tried, the court should coordinate a trial date with the parties and then send out notices of the date and time of trial to both parties.

When a defendant files his answer with the court, he may file a counterclaim against the plaintiff. If the defendant files a counterclaim against the plaintiff, the procedure regarding the counterclaim is the same as with the plaintiff's complaint. A plaintiff has to answer the counterclaim just as a defendant has to answer a complaint, and if the plaintiff fails to answer the counterclaim within the prescribed time, the plaintiff should be placed in default just as a defendant would be placed in default if he failed to answer a plaintiff's complaint. Plaintiff's answer to a counterclaim must be in writing. The plaintiff can prepare and file it with the court, or he may come into the court in person and request that the court put his answer in writing.

The chart below may be of some assistance in understanding these requirements.

	Contracts	**Other (torts, etc).**
liquidated claims	entitled to default judgment after proof of: (1) service liquidated of pleadings and, if answer made, notice of trial date; (2) failure to answer/absence of defendant at trial.	entitled to default judgment after notice of time of hearing and proof of case at trial.
unliquidated claims	entitled to default judgment only upon proof of case at trial unless: (1) account itemized and itemiza tion and affidavit of accuracy served upon opposing party with other pleadings; and proof of: (2) service of pleadings and, if answer made, notice of trial date; (3) failure to answer/absence of defendant at trial.	entitled to default judgment after notice of time of hearing and proof of case at trial.

In the event that neither party (plaintiff or defendant) appears at the trial date or has requested a continuance, then all claims and counterclaims should be dismissed by the court.

Once a default judgment has been entered against a party, notice of default judgment shall be promptly sent to the defendant. A defendant must file a request for a new trial within five (5) days from the date he actually receives his notice of judgment (see notice of default judgment and forms). (§ 22-3-1000; Ishmell v. State Highway Dept., 264 S.C. 340, 215 S.E.2d 201 (1975)). If the defendant makes a request for new trial within the five days after he actually receives notice of judgment, it is within the discretion of the trial judge to decide whether or not a new trial will be granted.

13. Testimony De Bene Esse

The taking of testimony "de bene esse," or in anticipation of future need, is a process of preserving

testimony which otherwise might not be available at trial. The testimony once taken is not automatically a part of the record and only becomes so upon its being offered at trial if the witness is unavailable for examination at the time. It may be offered by either party to the action, regardless of who requested its being taken, but may not be objected to by the offering party. Baker v. Metropolitan Life Insurance Company, 184 S.C. 341, 192 S.E. 571 (1937). The following paragraphs describe the process of taking such testimony, as set out in § 22-3-940.

If it appears in the judgment of the magistrate that the attendance and testimony of any witness as requested by a party may not be had due to 1) extreme age, 2) sickness or infirmity, 3) indispensable absence on public official duty, 4) the possibility that the witness may be outside of the State at the time of trial, or 5) the fact that the witness may be a resident of another county or outside the territorial jurisdiction of the magistrate, the magistrate may take the examination of the witness in writing or allow it to be done by another magistrate within or outside of the State, or by any other officer authorized by law to administer oaths. The "other officers authorized by law" in addition to magistrates include circuit judges, clerks of court, notary publics of this State as well as chancellors, justices or judges of a Supreme or superior court, mayors or magistrates, of any state of the United States, or of Great Britain or Canada. (Rule 28 SCRCP).

All parties to an action should be given at least five (5) days notice of the time and place of examination to allow their presence at the taking of the testimony. The examination of the witness should be conducted by the magistrate, but either party may submit questions to the magistrate to be included in his examination upon four (4) days notice to the opposing party, to allow the other time to prepare their own questions if they so desire. At the end of the examination of the witness, the magistrate, if he wishes to do so, may allow the parties present to submit further questions.

When the examination is taken by one other than the magistrate who will hear the action, it should be sealed, with the title of the case endorsed on its face, and conveyed by one having no interest in the case to the magistrate with jurisdiction over the case, or mailed to him with the postage prepaid.

14. Continuances and Postponements

Continuances and postponements are granted at the discretion of the magistrate. They may be ordered by the court on its own initiative if required by circumstance; for instance, if the court has another trial in progress at the time set for trial or if an amendment to the pleadings should necessitate a postponement. A continuance may also be granted on motion by a party to the suit, but the motion must be made for reasonable cause and at the earliest practical moment after circumstances justifying the continuance arise. Circumstances which might justify a continuance are illness of a witness or party (or attorney for one of the parties), or the unexpected absence of a witness at the time for trial, or the agreement of the parties to a continuance, or if one of the attorneys has another trial set for the same time.

If one of the attorneys in the action is a legislator, and seeks a continuance, the continuance should be granted whenever the attorney has satisfied the conditions of the Order issued by the Chief Justice dated May 17, 2001. The order provides that “lawyers who are members of the General Assembly may be protected for the purpose of being called to trial or hearing in any court of competent jurisdiction of this State, provided that the legislator files, with the appropriate court or clerk of court, a list specifying all cases in which the legislator is seeking protection and serves such list on opposing counsel.” The Order does provide for an exemption in “extraordinary circumstances, where substantial rights of the parties to the litigation will be defeated or severely abridged by the delay, or where the litigation involves emergency relief and irreparable damage.” See Orders Section.

The magistrate may not continue a civil case beyond ninety (90) days from date of filing, however, without good cause having been shown the court. (See Order of the Chief Justice dated June 26, 1980).

15. Summary Judgment

After the filing of a civil case and prior to the actual trial, you may occasionally receive a motion for summary judgment, often filed by parties represented by an attorney. Rule 56, SCRCP, which is made applicable to magistrate's court by Rule 81, SCRCP, allows the plaintiff or defendant, at any time after the expiration of 30 days from the commencement of the action or after service of a motion were summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part of the action. The motion shall be served at least 10 days before the time fixed for the hearing. The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001). Summary judgment is proper when, after reviewing the motion, supporting affidavits, and the pleadings, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party. Baughman v. American Telephone and Telegraph Company, 306 S.C. 101, 410 S.E.2d 537 (1991). Summary judgment is a drastic remedy and should be granted only upon clear and convincing evidence. Additionally, even where there is no dispute as to the evidentiary facts, but only as to the conclusions are inferences to be drawn from them, summary judgment should not be granted. Hamilton v. Miller, 301 S.C. 45, 389 S.E.2d 652 (1990). If, after a hearing, the court determines that summary judgment is appropriate, an order to that effect ending the case should be issued. If the court determines summary judgment is not appropriate, the case should proceed to trial. The denial of a motion for summary judgment is not directly appealable.

D.
Non-Jury Trials

1. Generally

Trials in the magistrates' courts may be either with or without a jury. Either party to a civil suit is constitutionally entitled to a trial by jury upon demand, but upon agreement of both parties, the right to trial by jury may be waived. (S.C. Code Ann. § 22-3-230).

Upon waiver of the right to trial by jury by both parties, the magistrate himself becomes the trier of fact, as well as the one who determines, based on the evidence, whether the plaintiff has proven his case over the defendant by a preponderance of the evidence. The standard of "proof by a preponderance of the evidence" is not as stringent a standard as that of "reasonable doubt" in criminal trials, and means generally that the evidence of one side or the other has "greater weight" or creates a "stronger impression."

The magistrate should base his decision upon all the evidence admitted at trial, taken as a whole, rather than on the side offering the greater number of witnesses or upon any evidence not admitted at trial. If the evidence offered by the plaintiff does not convince the magistrate by a preponderance, or greater weight, the magistrate must give a verdict for the defendant.

2. Defenses and Counterclaims

After the offering of the plaintiff's evidence, any defenses alleged by the defendant must be examined by the magistrate. If the evidence of the defendant offered in support of his defense is more convincing than the plaintiff's evidence contesting that defense, the verdict must be given for the defendant. But a verdict for the plaintiff must be given where the plaintiff's evidence contesting the defense was more convincing than the defendant's evidence supporting his defense.

Any counterclaims that are tried along with the plaintiff's claims must be considered and decided by the same standard of "proof by a preponderance" as was applied to the plaintiff's evidence. Considering all evidence as to the counterclaim offered by both parties, the magistrate must award a verdict to the side offering the more convincing evidence. Any defenses to a counterclaim must be considered as well.

The possibility of the existence of claims and counterclaims can mean that a plaintiff may win his claim and beat a counterclaim, or win his claim while losing a counterclaim, or lose a claim and win against a counterclaim. In some instances, a verdict in favor of a counterclaim may result in a set-off. (§ 22-3-280).

3. Damages

The magistrate may only award those compensatory damages (amount to replace loss or make good actual damage) which are proven by a preponderance of the evidence.

Punitive or exemplary damages (amount in excess of that for compensation) may be awarded only where there is convincing evidence of willfulness or malice, but are not appropriate in cases of simple negligence or mistake.

The total sum of compensatory and punitive damages may not exceed the $7,500.00 jurisdictional limit. Note, however, that fees and costs which are ultimately taxed against the losing party are not

considered to be part of the amount claimed, and therefore have no bearing on the determination of whether or not the amount claimed is within the jurisdictional limits of § 22-3-10. (Op. Att'y Gen. dated April 25, 1978). Thus it would appear that in most civil cases magistrates may render a judgment of up to $7,500.00 plus fees and costs permitted by law. The determining factor as to whether a specific claim exceeds the jurisdictional amount prescribed for magistrate's court is the amount of the damages being sought minus any attorneys' fees or costs. See discussion under Section G, PROCEDURE AFTER THE VERDICT, concerning the award of attorney's fees.

E.
Trial by Jury

Either party to a civil suit in magistrate's court is entitled to a trial by a jury. (S.C. Code Ann. § 22-3-230) Upon the demand for a jury trial by either party, the magistrate must impanel a jury of six people, following the procedure in § 22-2-80 through § 22-2-140, who will determine the outcome of the case. If neither party requests a jury trial, the magistrate may hear and decide the case himself.

1. Jury Selection

The chief magistrate of the county is required to forward to each magistrate a precinct-by-precinct list of qualified electors in the district or vicinity of each magistrate's court. During the first thirty (30) days of each calendar year, these names must be placed in the jury box prepared as provided in § 22-2-60. Section 22-2-80 provides the manner of selection of the jury list for a single trial. Subsection (A) provides, “a person appointed by the magistrate who is not connected with the case for either party must draw. . .at least thirty (30) names, but not more than one hundred (100) names, from the jury box, and this list of names must be delivered to each party, or to the attorney for each party. Section 22-2-80 also provides that, “if a court has experienced difficulty drawing a sufficient number of jurors from the qualified electors of the area, and, before implementing a process pursuant to this subsection, seeks and receives the approval of South Carolina Court Administration, the person selected by the presiding magistrate may draw at least one hundred (100) names, but not more than a number determined sufficient by Court Administration for the jury list, and shall deliver this list to each party, or the attorney for each party. §22-2-80 (B). Request for prior approval must be in writing.

Section 22-2-90 provides an additional procedure for drawing jury lists for courts having scheduled terms of court. Under this section, “[n]ot less than ten nor more than forty-five days before a scheduled term of jury trials, a person selected by the presiding magistrate must draw at least 40 jurors but not more than one hundred jurors to serve one week only.” Section 22-2-90 provides that the courts which schedule terms for jury trials may receive prior approval from South Carolina Court Administration to “draw at least one hundred names but not more than a number determined sufficient by Court Administration to serve one week only” if the court has experienced difficulty in drawing a sufficient number of jurors. § 22-2-90 (C). Request for prior approval must be in writing. “Immediately after such jurors are drawn, the magistrate shall issue his writ of venir facias for such jurors regarding their attendance on the first day of the week for which they have been drawn and such writ shall be forthwith delivered to the magistrate’s constable or the sheriff of the county concerned.” § 22-2-90 (D).

Section 22-2-100 provides that “[t]he names drawn pursuant to either Section 22-2-80 or Section 22-2-90 must be placed in a hat or box and individual names randomly drawn out one at a time until six jurors and four alternates are selected. Each party has a maximum of six (6) peremptory challenges as to primary judges and four (4) peremptory challenges as to alternate jurors, and other challenges for cause as the court permits. If for any reason it is impossible to select sufficient jurors and alternates from the names drawn, names must be drawn randomly from Compartment ‘A’ until sufficient jurors and alternates are selected.” If at the time set for the trial, there are not sufficient jurors to proceed because one or more have failed to attend, have not been summoned, or have been excused or disqualified by the court, additional jurors must be selected from the remaining names or in the manner provided in Section 22-2-80 or Section 22-2-100.”

2. Voir Dire

Once the six jurors are chosen but prior to their being sworn, the magistrate should conduct an

informal "voir dire." Voir dire means "to speak the truth," and is a short inquiry by the judge to determine whether bias or prejudice exists in the minds of any of the jurors. The magistrate may ask his own questions or may solicit questions from the parties, or their attorneys. Based on the answers to the inquires, the magistrate should determine, in his discretion, whether each juror can serve impartially or should be disqualified. Parties to actions may request specific questions be asked jurors during this process. Approval or disapproval of those questions is within the sole discretion of the trial judge and will not be grounds for reversal absent an abuse of discretion. The following are typical "voir dire" questions, but are, by no means, exhaustive:

1. Are you related by blood or marriage to either party?

2. Have you any special interest in this action?

3. Have you read an account of this action in the newspaper?

4. Have you discussed this action with anyone or has it been discussed in your presence?

5. Have you formed or expressed an opinion as to the outcome of this action?
(5a) If you have such an opinion, is it so fixed that if selected as a juror, you could not leave that opinion behind and reach your verdict based solely upon the testimony and other evidence presented at trial, and the law as it will be charged to you?

6. Do you hold any bias or prejudice, for or against either party to this action?

7. Do you know of any reason why you could not give a fair and impartial trial to any of the parties to this action?

If a juror should answer "yes" to one or more of these questions, the magistrate should examine that juror carefully to see if he should be disqualified. If it appears that disqualification is necessary, the magistrate should summon other prospective jurors until six jurors are chosen.

3. Disqualification, Exemption, and Excuse of Jurors

In South Carolina, there are several grounds for disqualification, exemption, or excuse from jury service. The following show the allowances in each category:

Disqualifications: You may not serve as a juror: If you have been convicted in a State or Federal court of a crime punishable by more than one year; or if you are unable to read, write, speak, or understand the English language; or if you are unable to render jury service due to mental or physical infirmity; or if you have less than a 6th grade (or equivalent) education; or if you are a County officer or court employee. (See §§ 14-7-810 and 14-7-820).

Exemptions: Section 14-7-840 provides: "No person is exempt from service as a juror in any court of this State except men and women over sixty-five years of age. A person exempt under this section may be excused upon telephone confirmation of date of birth and age to the clerk of court or chief magistrate. Notaries public are not considered state officers and are not exempt under this section." Please Note that this is an “exemption,” not a “disqualification,” from jury service. Many individuals over the age of 65 wish to serve on a jury and are constitutionally entitled to that duty. These individuals are entitled to serve and must be issued a juror summons if a court draws their name.

Excuses: You may be excused from jury service if you can show good and sufficient excuse, by

application, as to why you should not have to serve; or if you are a woman with legal custody of children under the age of seven years and you show by affidavit that you cannot provide adequate care while serving as a juror. Typical reasons may include temporary or permanent physical disability or women with legal custody of children under the age of seven years. Section 14-7-860 provides that, “upon submitting an affidavit to the clerk of court requesting to be excused from jury duty, a person either may be excused or transferred to another term of court by the presiding judge if the person performs services for a business, commercial, or agricultural enterprise, and the person’s services are so essential to the operations of the business, commercial, or agricultural enterprise that the enterprise must close or cease to function if the person is required to perform jury duty.” Section 14-7-860 further provides that a person who is the primary caretaker of a person sixty-five years of age or older or a severely disabled person who cannot care for himself or cannot be left unattended may be excused from jury duty by the presiding judge.

Postponement: A student or school employee selected for jury service during the school term may request a postponement to a date that does not conflict with the school term. For purposes of these sections, a student is a person enrolled in high school or an institution of higher learning, including technical college. (§§ 22-2-85 and 14-7-845).

4. Disobedience to Summons

Section 22-2-130 permits the magistrate to punish any properly summoned prospective juror who fails to respond to the summons. If the disobedient juror fails to contact the magistrate and offer a sufficient reason for his delinquency within 48 hours, he shall pay a civil penalty not exceeding $100.00. Should that person fail or refuse to pay the civil penalty, the magistrate may find that person in contempt and punish him according to § 22-3-950. No person shall serve on a magistrate's court jury more than once every calendar year.

5. Miscellaneous Jury Matters

Individuals serving on a magistrate's court jury or on a coroner's jury are entitled to receive $10 per day, plus mileage. The county in which the jury sits is responsible for the payment of this compensation. (§ 22-2-160).

The mileage and compensation should be determined at the end of trial after final determination.

6. Preliminaries to Jury Trial

Once the six jurors have been drawn, the magistrate should administer the oath. A suggested form is: "Do each of you solemnly swear or affirm that you will well and truly try this cause and render a true verdict according to the law and evidence produced before you, so help you God?"

However, if for any reason, religious or otherwise, a juror who wishes to serve has objection to the making of the oath, the juror may make a solemn and conscientious affirmation and declaration of his duty to serve and render a true verdict, and this is sufficient to constitute a valid oath. (§ 14-7-1130).

The magistrate, at this point, may appoint a foreman from the six jurors impaneled, or he may allow the jury to retire and choose their own. (§ 14-7-1310).

7. Introductory Remarks

After the jurors are seated, the magistrate should make some introductory remarks, with the purpose

of informing the jury about the general nature of a trial and the specific nature of the trial which they are to hear. A brief outline of the steps to be followed during the trial which could be helpful to the jury might be covered as below:

> "The parties, or their attorneys, will make an opening statement of the case as they see it, the plaintiff making his statement first and the defendant following; this opening statement is purely a matter of choice and no conclusions should be drawn by you (the jury) if one party or both prefer not to make an opening statement."
>
> "The opening statement is not evidence, but merely a statement by the party as to how they view the case."
>
> "After the opportunity for making the opening statements ends, the plaintiff will present his case in chief, in which he offers witnesses or whatever other forms of evidence he deems necessary to prove his case; when the plaintiff rests his presentation, the defendant then will present his case in chief, and if the defendant has a counterclaim, he must present any evidence to support it at that time."
>
> "The parties next will be given an opportunity to offer evidence to rebut that of the opposing party, but this is their choice."
>
> "The parties will make their closing arguments; which are merely their summations of the case and are not to be considered as evidence." (1)
>
> "You will then be given your instructions, or the charge, by me regarding the law governing the case; you must take the law and apply it to the facts of the case as you interpret them."
>
> "Finally, you will retire to deliberate on the case and render your verdict."

Aside from the explanation of the trial procedure, some of the following instructions, where appropriate, may be made:

> "It is your duty to determine the facts of the case from the evidence, and from reasonable inferences arising from such evidence. You must not indulge in guesswork or speculation."
>
> "The evidence which you are to consider is the testimony of the witnesses and exhibits admitted into evidence as well as any admissions or stipulations."
>
> "A witness is a person who testifies in a case."
>
> "At certain times during the trial, there may be objections to evidence. The admission of evidence is governed by rules of law. When an objection is made, you must not draw any inference because of the objection or from the fact that the question was asked."
>
> "You must not consider any evidence that I instruct you to disregard. You must not infer that I am leaning in favor of either party because of that ruling. You are reminded that opening statements and closing arguments, if offered, are only for the purpose of assisting you in understanding the evidence in applying the law, but do not constitute either law or evidence."

"It is your duty to carefully examine and weigh the testimony of the witnesses and the evidence as a whole. You are the sole judge of the credibility of a witness, and the weight to be given to the testimony of a witness. You may consider the interest or lack of interest of the witness in the result of this trial, the bias or prejudice of the witness if any has been shown, the conduct and demeanor of the witness, the witness' recollection and opportunity for observation, the reasonableness of the testimony, and all the facts and circumstances that either tend to support or discredit the testimony of the witness. You may give to the testimony of each witness such weight and credit as you believe it is fairly entitled to receive."

"In your deliberations, you must not be influenced by sympathy, passion, prejudice or bias, or your personal feelings for or against the parties or their counsel. It is your duty to follow the instructions given to you at the end of the case concerning the governing law."

"Until this case is submitted to you at the time you are instructed to begin your deliberations, you must not discuss the case with anyone, or remain in the hearing of anyone discussing the case, and you must not read any newspaper accounts, or listen to any radio or television broadcasts discussing it. Once the case is submitted, you may only discuss the case in the jury room and only with all jurors present. You must keep an open mind and not reach a decision on any issue until it is submitted for your deliberation under the instructions."

"If any person tries to discuss the case with you, you are to advise them you are a juror in the case and cannot discuss it and then you must report that incident to me."

8. Counterclaims

The existence of a counterclaim in an on-going action requires special attention by the judge and jury to insure its proper consideration. As the counterclaim is the defendant's claim of entitlement separate from the claim of the plaintiff's, it must receive similar consideration by the jury at some point in the trial proceeding.

The judge should clearly state at the outset of the trial what the issues of the claim and counterclaim are, thereby apprising the jury of its responsibility to ultimately render separate verdicts on the claim and counterclaim. A simple instruction to the jury should be included in these initial charges where such a counterclaim exists. Please be reminded that if the amount of a counterclaim exceeds your jurisdictional limit, the case should be transferred to circuit court.

9. Contempt

The power of a magistrate to punish for contempt is bestowed by § 22-3-950. This section permits the magistrate to punish for contempt of court by imposition of sentences up to the limits imposed on magistrates' courts in § 22-3-550, which is currently a fine of five hundred dollars, thirty days imprisonment, or both. Actions under this section punishable by contempt are persons insulting the magistrate or a juror or anyone willfully guilty or unduly disturbing a court proceeding.

Op. Att'y Gen., No. 78-191, states that, "Pursuant to Section 22-3-950, magistrates may punish all behavior within the definition of contemptuous done in their presence while performing the duties of their office as contempt of court. This would include contemptuous actions during bond proceedings, preliminary examinations, and warrant issuing proceedings."

A judge's contempt power is limited to when he or she is in the courtroom while court is in session. Extreme discretion should be used when contemplating a contempt citation. See: In the Matter of Kenneth Edwards, 319 S. C. 57, 459 S. E. 2d 837 (1995). State v. King, 306 S.C.335, 412 S.E.2d 375 (1991). State v. Harper, 297 S. E. 257, 376 S. E.2d 272 (1989). Spartanburg County DSS v. Linda Padgett In re Karen K. Rogers, 296 S. C. 79, 370 S. E.2d 872 (1988).

Section 40-5-510 should be consulted when finding an attorney in contempt. This section provides: "Attorney, solicitors and counsellors may be removed or suspended and also, in aggravated cases, imprisoned, not exceeding twenty-four hours, by the several courts in which they have been admitted to practice, if, in the presence of such court, they are guilty of any disorderly conduct causing an interruption of business or amounting to an open and direct contempt to the court, its authority or person."

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1. Although the order of closing arguments is not set by statute or court rule, the traditional order of the closing arguments is Plaintiff-Defendant-Plaintiff.

F.
Special Matters at Trial

1. Variances Between Pleadings and Proof

Variances between the allegations of the pleadings and the proof presented at trial should be disregarded as immaterial unless the court determines that the adverse party was misled to his prejudice thereby. (S.C. Code Ann. § 22-3-260).

2. Sequestration of Witnesses

Upon request of one party, witnesses who are expected to give testimony at a later point in the trial may be excluded from court to prevent their hearing any earlier testimony. Sequestration may only be applied to witnesses, and not to parties to the dispute even though they may be called upon to testify. In addition, parties found to be victims may not be sequestered.

3. Admissibility of Evidence

A task of the magistrate of major importance is to rule on the admissibility of evidence by sustaining or overruling objections to its introduction. The magistrate should familiarize himself with the S.C. Rules of Evidence.

4. Objections

Objections by a party, or their attorney, should be to the admissibility of evidence or the conduct of a party (or attorney), or to the form of a question during examination of a witness.

In any case, the objection should be stated clearly by the party making it, and it should be stated with specificity. The magistrate may immediately rule on the objection or allow the opposing party to be heard . When in doubt, both parties should be heard, and the magistrate should then rule, sustaining or overruling the objection. After the ruling is made, no further discussion of the ruling should be allowed, as the judge's ruling ends the issue.

5. Jury Note-Taking

Jurors should not be permitted to take notes during trial as all material which may be considered as evidence will be sent to them in their deliberation room for consideration.

6. Bench Conferences with Counsel

Oftentimes, a lawyer may request permission to approach the bench for the purpose of discussing some point of the trial out of the hearing of the jury. In most instances, the magistrate should allow it, having both attorneys or parties come forward. If the discussion is lengthy, the jury should be recessed.

7. Compelling Attendance of Witnesses

Upon the request of any party to an action, the magistrate must issue a summons compelling the attendance for the purpose of giving testimony of any person whose testimony may be required and who resides in the county. The summons should show a certain time and place at which the witness is to appear, and must be served on the witness at least one day before his appearance is required.

(§ 22-3-930).

Should a properly notified witness fail to appear, the magistrate may issue a rule to show cause commanding the witness be brought before the magistrate, or if any witness attending refuses to give evidence without showing good cause, the magistrate may punish the witness for contempt by imposition of a sentence up to the limits imposed on magistrates' courts in Section 22-3-550. (§ 22-3-930).

8. Compensation of Witnesses

In magistrates' courts in civil cases, witnesses should receive $25 dollars per day for each day's attendance and the same mileage as provided for official travel for state employees and officers. Op. Att'y Gen. dated February 5, 1987. These fees are to be paid by the party calling the witness. The fees as authorized may be used for the purpose of determining costs to be assessed against a losing party. Section 19-9-80 details costs and fees for non-resident witnesses.

9. Keeping of a Trial Record

While there is no specific provision requiring magistrates to take down or record the testimony of witnesses or the proceedings on civil matters as exists for criminal actions (§ 22-3-790), since the return of the magistrate to the higher court on appeal includes "the testimony, proceedings and judgment," a requirement of a certain degree of recordation is implied. Magistrates should take down a general outline of the proceedings, as well as a substantive, but not necessarily verbatim, description of the testimony (Op. Att'y Gen. No. 3206 dated 1970-71) and have it signed by the witnesses. Ideally, a court reporter, stenographer or a mechanical device should be used to preserve the proceedings.

In any case in magistrate's court, in which the magistrate takes down the substance of a witness' testimony, it should be signed by the witness and then filed in the civil docket book.

In a case before a magistrate in which a stenographer is present and takes down the testimony, or it is electronically recorded, the transcription need not be read over and signed by the witnesses, but only filed as usual, and may in the discretion of the magistrate upon determining its accuracy be authorized as the official trial record.

10. Directed Verdicts

Upon the conclusion of the presentation of all evidence in a civil case, if in the opinion of the judge there is only one reasonable inference to be drawn from the whole of the testimony, the trial judge may hold that there are no factual issues for the jury's consideration and render a directed verdict on the questions of law presented. (Rule 50(a), SCRCP). Upon the rendering of such a verdict by the magistrate, the jury should make no further consideration of the case and should be discharged.

11. Final Instructions to the Jury

At the conclusion of the closing arguments, the magistrate should instruct the jury as to the law applicable to the facts in the case. Though there are no specific provisions as to jury instructions, or charges, in the magistrate's court, such instructions should include all matters of law which the magistrate considers necessary to the jury in their deliberations. The magistrate may, at the beginning of the trial, inform the parties, or their attorneys, that they may submit suggested charges they would like read to the jury. The magistrate should examine these submitted instructions,

eliminating those not supported by sufficient evidence or by law, as well as those which duplicate any instructions he intends to give.

Instructions should be as brief as possible, while at the same time clear and understandable. Repetition or duplication of instructions should be avoided as it gives the appearance of undue emphasis on the point.

The magistrate himself should charge the jury. It should never be done by one of the parties or their counsel. The following are suggested instructions:

> "You have heard all the evidence presented by the plaintiff and the defendant.
>
> "It is your duty to determine the facts, and to determine them from the evidence and the reasonable inferences arising from the evidence, and in so doing you must not indulge in guesswork or speculation. You must not be influenced by prejudice, passion, or sympathy.
>
> "The evidence which you are to consider consists of the testimony of witnesses and the exhibits admitted in evidence. You must not concern yourself with the objections or the reasons for any rulings. You must not consider testimony or exhibits to which an objection was sustained, which has been ordered stricken, or which I have instructed you to disregard.
>
> "Opening statements and closing arguments of the attorneys are intended to help you in understanding the evidence and applying the law, but they are not evidence.
>
> "No statement, or ruling or remark which I may have made during the course of the trial is intended to indicate my opinion as to what the facts are. You are to determine the facts. In this determination, you alone must decide upon the believability of the evidence and its weight and value. In considering the weight and value of the testimony of any witness, you may take into consideration the appearance, attitude and behavior of the witness, the interest of the witness in the outcome of the suit, the relation of the witness to any parties to the suit, the inclination of the witness to speak truthfully or not, the probability or improbability of the witness' statements, and all other facts and circumstances in evidence. Thus, you may give the testimony of any witness just such weight and value as you believe the testimony of such witness is entitled to receive."

Next, the jury should be instructed on the standard of proof by which they must make their determination:

> "You must deliver a verdict in accordance with the preponderance of the evidence. A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds the belief that what is sought to be proved is more likely true than not true."
>
> "In determining whether an issue has been proved by a preponderance of the evidence, you should consider all the evidence bearing upon the issue, regardless of which side has produced it."

At this point, the magistrate should instruct the jury on the law applicable in the action as to the plaintiff's claim and affirmative defenses or counterclaims. A separate charge which may be used where counterclaims exist is as follows:

"Upon your conclusion and verdict as to the entitlement of the plaintiff to recover on his claim, it is then your duty to consider the counterclaim of the defendant which has been read to you. In doing so, you will simply reverse the position of the parties and apply the legal principles and standards of proof which I have explained to you in their new roles; because insofar as the counterclaim is concerned, the defendant has the affirmative burden of proof on the issue. In order to recover he must establish his claim by the greater weight of the evidence, or the preponderance." (An explanation of the possible verdicts may be given here).

To complete the instructions the following may be used:

"Until this case is submitted to you for your deliberation, you must not discuss this case with anyone or remain within hearing of anyone discussing it. After this case has been submitted to you, you must discuss this case only in the jury room when all members of the jury are present. You are to keep an open mind and you shall not decide any issue in this case until the case is submitted to you for your deliberation.

"When you retire to the jury room, you should first (if you have not done so already) select a foreman to act as presiding officer in your deliberation of each issue. If any questions arise concerning the law, the foreman will send a request to me through the constable. I will then convene the jury and answer the question. You must not attempt to gain any information about the case by any other method.

"The constable is present to maintain the privacy of your deliberations, to assist in meeting your physical necessities, and to relay any questions to me. You must not attempt to involve the constable or any other person in your deliberations.

"Your verdict must be unanimous."

12. Submission of the Case

Upon completion of instructions to the jury, the magistrate must inquire of the parties if there are any additions or corrections to the charge as given, and that done, the jury should be retired to the deliberation room. The jurors should take with them into the jury room all papers received in evidence, any exhibits admitted, and a copy of the written jury instructions (if possible).

If a question should arise during the course of the jury's deliberations, the magistrate should ascertain from the foreman the nature of the question. If the question is of a factual matter, the magistrate should instruct the jury that their recollections and interpretations of factual matters are their only guide as there is usually no record of the testimony available. However, if trial testimony was recorded or transcribed by an authorized stenographer or reporter, the magistrate may allow the transcript in the deliberation room for the jury's consideration. If the question is of a collateral nature, or is not relevant to the issues to be determined, the magistrate should instruct the jury to ignore it and continue its deliberations.

If the question is one pertaining to the law affecting the issues of the action, the magistrate should re-read that part of his instructions dealing with the point causing the jury's confusion. If that is not sufficient to clarify the issue of law, the magistrate may prepare, with the assistance of the parties if he desires, further instructions for the jury.

If the jury is unable to reach a unanimous verdict and so informs the magistrate, he should re-

convene the jury in the courtroom and remind the jury of its obligation to reach a verdict. The jury should then be returned to the jury room for further deliberation. A suggested charge for this situation is as follows:

> "In many cases considered by juries, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not mere acquiescence in the conclusion of his fellows, yet, in order to bring six minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided; that you are selected in the same manner, and from the same source, from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to six people more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other. And with this view, it is your duty to decide the case, if you can conscientiously do so."

13. Mistrials

A jury, once impaneled should not be discharged until a verdict is reached or the judge in his discretion determines that a mistrial should be declared. A mistrial should only be declared in two instances. If during the course of the trial, an occurrence in the presence of the jury, in the form of conduct of any party, attorney or other, or by the exposure of otherwise inadmissible evidence, is determined by the magistrate to have created a likelihood of improper prejudicial effect on the minds of the jurors, a mistrial may be declared. A mistrial may also be declared if, after several attempts by the jury over a period of time, and possibly after further instructions from the magistrate, the magistrate is convinced that the jury will not be able to reach a unanimous verdict.

14. Returning the Verdict

Upon finally reaching the verdict, the foreman of the jury should so advise the magistrate. Court should be reconvened with all parties present, as well as their counsel, and the jury. The foreman should hand the verdict in written form to the magistrate. The parties should be directed to rise and the magistrate should then pronounce the verdict, which should include an announcement of the party in whose favor the jury decided, the amount of damages awarded on the claim, and the verdict and amounts awarded on any counterclaims.

G.
Procedure After Verdict

1. Filing of the Judgment

Upon the rendering of a verdict (by the jury or the judge in a non-jury matter), the final judgment of the court should be entered in the civil docket book of the magistrate's court. If one or both parties were absent at the trial, the magistrate should have served upon the parties a written statement so as to give each party notice of the court's judgment or other action, as in the case of a dismissal or postponement. Such written notice should also be served on the parties when a magistrate fails to announce the final judgment at trial in the presence of the parties. This written notification of the judgment is important in these two situations because the time periods relating to appeals and new trials begin to run only after the parties receive actual notice of the judgments.

After the judgment is rendered and docketed, the judgment of the magistrate's court is enforceable by the magistrate within his county in the manner prescribed by law.

2. Magistrates' Judgments Recorded in Circuit Court

As judgments of the Circuit Court offer several advantages which magistrates' judgments do not, the victorious party may wish to record the judgment in the circuit court pursuant to the procedures of S.C. Code Ann. §§22-3-300 and 15-39-90. Upon request, the magistrate must provide that party with a "transcript" of the judgment which may then be filed, by the requesting party, with the clerk of court of the county in which it was rendered. After being so filed with the circuit court, it becomes a judgment of that court, and is enforceable as any other judgment of the circuit court. A certified copy of the transcript may be filed and docketed in the clerk's office of any other counties with the same effect. A magistrate's judgment is valid for three years, whereas a circuit court judgment is valid for ten years. Therefore, the filing of a magistrate's judgment in circuit court extends the life of the judgment to that of the circuit court's. Judgments in South Carolina may not be renewed. The South Carolina Supreme Court has concluded that a judgment is “utterly extinguished after the expiration of ten years from the date of entry.” Hardee v. Lynch, 212 S.C. 6, 17, 46 S. E.2d 179, 183, (1948); see also Garrison v. Owens, 258 S.C. 442,446-47, 189 S.E.2d 31,33 (1972) (stating that “[a] judgment lien is purely statutory; its duration as fixed by the legislature may not be prolonged by the courts and the bringing of an action to enforce the lien will not preserve it beyond the time fixed by the statute, if such time expires before the action is tried.”).

If the magistrate should grant a new trial, the judgment is "set aside" or "vacated" in both the magistrate's court and the circuit court, if filed in both.

3. Costs

The prevailing party in an action is entitled to recover costs from the losing party as part of the judgment. Any party, before paying any costs in the magistrate's court, may demand of the magistrate an itemized account of such costs, and no person can be compelled to pay the costs unless the magistrate furnishes the accounting. (§ 22-3-1010).

4. Attorney's Fees

Attorney's fees may be awarded in a civil case in magistrate's court when appropriate. The general rule is that attorney's fees are not recoverable unless authorized by contract or statute. Where there is a contract or statute providing for reasonable attorney's fees, the award of fees is left to the sole

discretion of the trial judge and will not be disturbed on appeal unless an abuse of discretion by the trial judge is shown. In awarding reasonable attorney's fees, the following six factors should be considered:

1. The nature, extent, and difficulty of the legal services rendered.

2. The time and labor necessarily devoted to the case.

3. The professional standing of counsel.

4. The fee customarily charged in the locality for similar legal services.

5. The contingency of compensation.

6. The beneficial results obtained.

Baron Data Systems v. Gross, Lotter & Smith, 377 S.E.2d 296 (1989). Attorney's fees should not be awarded pro se litigants (parties representing themselves), even if they are pro se attorney litigants. Calhoun v. Calhoun, 339 S.C. 96, 529 S.E.2d 14 (2000). As previously stated in this text, attorney's fees would be considered as costs and would not be included when determining your jurisdictional amount.

5. New Trial

A "new trial" is a re-examination in the same court of an issue of fact after a verdict is rendered by a jury, or is decided by the magistrate in a non-jury trial. The only remedies available to a party against whom a judgment is rendered are either to appeal (§ 18-7-10, et seq)., or to make a motion for a new trial (§§ 22-3-990 and 22-3-1000), and appeal upon the refusal of such motion.

A motion for a new trial must be made (and should be required to be in writing) within five days from the time the party receives notice of the judgment; but if the judgment resulted from a default and failure of the party to appear at trial, or in a situation in which appellant did not have notice of the trial, the five day period begins to run on the day after personal notice is received. (§ 22-3-1000). See Brewer v. S.C. State Highway Dept., 261 S.C. 52, 198 S.E.2d (1973); O'Rourke v. Atlantic Paint Co., 91 S.C. 399, 74 S.E. 930 (1912). The right of appeal from the judgment exists for thirty days after the refusal of a motion for a new trial. Section 22-3-1000.

While the law does not generally favor setting aside a verdict, especially a jury verdict, the granting of a new trial in any case is entirely within the discretion of the magistrate. However, new trials may be granted only for a reason which new trials have usually been granted in the circuit courts of this State. Examples of reasons for which new trials were granted are as follows:

When the jury verdict is so confused that it is not absolutely clear what was intended, Anderson v. Aetna Casualty and Surety, 175 S.C. 254, 178 S.E. 819 (1934).

Where the jury disregarded the charges of the judge, Respass & Respass, C P.A. v. King Pontiac, 236 S.C. 363, 114 S.E.2d 486 (1960).

Where the jury verdict is contrary to the weight of the evidence, Daniels v. Bernard, 270 S.C. 51, 240 S.E.2d 518 (1978).

Where an excessive verdict is rendered, and the judge is so convinced by clear conviction, Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993).

Where there was an error in the amount of the verdict, Levi v. Legg and Bell, 23 S.C. 282 (1885).

Where verdict is grossly inadequate in a tort action, Toole v. Toole, 260 S.C. 235, 195 S.E.2d 389 (1973).

In Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993), the S.C. Supreme Court held that to obtain a new trial based on after discovered evidence, the party must show that the evidence:

(1) would probably change the result if a new trial is had;
(2) has been discovered since the trial;
(3) could not have been discovered before trial;
(4) is material to the issue of guilt or innocence; and
(5) is not merely cumulative or impeaching.

For relief from a judgment obtained in a magistrate's court due to the clerical mistakes, mistake, inadvertence, surprise, excusable neglect of a party or their attorney, newly discovered evidence, fraud, misrepresentation, misconduct, or the judgment is void, see Rule 60, SCRCP.

6. Appeals

Any person may appeal the judgment of the magistrate's court to the circuit court of the county in which the judgment was rendered. A party may appeal from a judgment in a magistrate's court without having made a motion for a new trial with the magistrate, but once such a motion for a new trial is made, an appeal of the judgment is not properly made until refusal of the motion.

a. Restriction Of Action During Appeal

During the time allowed for the filing of the appeal, or if an appeal is pending, no sale shall be made on any execution until the expiration of time for appeal or until the appeal is heard and decided or dismissed. (§ 22-3-310). In actions for the claim and delivery of personal property when bond for the property claimed has been properly given by either party, the status of such property shall not be changed until after the expiration of the time for appeal or termination of the appeal. (§ 22-3-310). In cases in which a bond with surety to cover the amount of judgment and costs is issued by a party, the appeal acts as a supersedeas, and no executions may issue until the appeal is terminated. (§ 18-7-10). In residential landlord actions, the filing of a bond stays the execution of judgment pending the outcome of an appeal. (§ 27-40-800).

In instances in which a bond must be paid in any civil proceeding, the bond should be paid to the clerk of court of the county in which the magistrate holds office. (§§ 15-1-230 and 15-1-260).

b. Effecting the Appeal

The party appealing, the appellant, must serve a notice of appeal upon both the magistrate and the opposing party, or respondent, within thirty days of receipt of notice of the judgment, order, or decision from which the appeal is taken. In addition, the appellant must serve the notice of appeal on the clerk of court and pay the appropriate filing fee.

(Rule 74, SCRCP) (See §8-21-310(11)(a) for the amount of the filing fee).

If the appellant appeared at trial and the judge announced the final judgment in his presence, written notice of the judgment is not required in order to start the running of the thirty day period. If the appellant failed to appear at trial, or the judge failed to announce the final judgment in the appellant 's presence, the thirty day period begins to run only after appellant's receipt of written notice of the judgment, order, or decision. (§ 18-7-20). If a motion for a new trial is properly made within the prescribed five day period pursuant to § 22-3-1000, but refused, the right of appeal exists for thirty days after receipt of written notice of the refusal, during which time the notice of appeal must be served.

c. Service of Notice of Appeal

The notice of appeal must be served upon the opposing party pursuant to Rule 5, SCRCP within the time limit previously discussed. The magistrate should be served with a notice so that the return may be prepared and transmitted to the clerk of the circuit court in a timely fashion. This procedure is clearly anticipated by Rule 75, SCRCP.

When a party is represented by an attorney, the notice of appeal must be served upon the attorney unless the court orders service directly upon the party. The attorney or party is served by delivery of the notice of appeal to him or mailing it to him at his last known address.

If no address is known, the notice may be left with the clerk of court. Delivery of the notice of appeal can be accomplished by handing the notice to the attorney or the party, or by leaving it at his office with someone in charge. If no one is in charge of the office, service can be accomplished by leaving the notice in a conspicuous place in the office. When the office is closed or the attorney or party to be served does not have an office, service may be accomplished by leaving the notice of appeal at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. (Rule 5(b)(1), SCRCP).

d. Contents of Notice of Appeal

The notice of appeal should contain a general statement of the grounds upon which the appeal is founded. It should state in what particular or particulars the appellant claims the judgment should have been more favorable to him. If the appeal is based on disagreement with the amount of the judgment, the appellant must state what the amount should have been. (§ 18-7-30).

e. Return by the Magistrate

The magistrate, within 30 days after service of the notice of appeal, must make a return to the circuit court of the original record consisting of a list of the witnesses, their testimony, the proceedings, and the judgment, and file the return with the clerk of the circuit court. (Rule 75, SCRCP). The clerk of the magistrates court must certify the return before transmitting it to the clerk of the circuit court. If the magistrates court does not have a clerk, the magistrate must certify the return. (Rule 75, SCRCP). When a magistrate by whom a judgment appealed from shall have gone out of office, or have been removed to another county of the State, he shall make a return as if he were still in office in that county. (§§ 18-7-70 and 18-7-90). If the magistrate should die, become insane (or

otherwise incapacitated) or be outside of the State before having made a return, the circuit court may examine witnesses on oath as to the facts and circumstances of the trial or judgment and thereby determine the appeal as if a return had been received. (§ 18-7-90).

If the return of the magistrate should be defective, the circuit court may order a further or amended return as often as is necessary (§ 18-7-80), or if the magistrate continually fails to respond to a request for an adequate return, the case may be remanded and a new trial ordered. Chapman v. Computers, Parts & Repairs, 334 SC 387, 513 S.E.2d 120 (1994).

f. Offers of Revision and Allowance

Section 18-7-100 permits the respondent to offer in writing to the appellant and the magistrate a correction of the judgment. This section should be examined for the time periods and procedures in the event such an offer is made.

Either party pursuant to § 18-7-110 may, at any time before trial of the appeal, offer to the other party (in writing) an accommodation by allowing judgment against him in a certain sum. This section should be examined when the need arises.

g. Judgment on Appeal

Upon hearing the appeal, the circuit court may give judgment according to the justice of the case, without regard to technical errors and defects not affecting the merits. (§ 18-7-170).

H.
Attachment

1. Generally

Attachment is a statutory remedy (beginning at S.C. Code Ann. § 15-19-10), which enables a magistrate, upon the action of plaintiff, to attach property of a defendant which is within the territorial jurisdiction of the court. Magistrates are specifically authorized by §§ 15-19-40 and 22-3-10(4) to grant attachments in actions in which the debt or damages do not exceed their $7,500.00 jurisdictional amount limitation. The purpose of the remedy is twofold: to increase the likelihood of the appearance of the defendant and to preserve property for the satisfaction of any judgment rendered against the defendant.

2. Time When Attachment May Be Sought

Attachment is a temporary proceeding which may be granted only along with a main action for damage or indebtedness, and only after that other action has been commenced by issuance of a summons. The right to recover a judgment on that damage or indebtedness and the right to attach the property of a defendant are two separate and distinct actions; the latter fails without the former, and upon the dismissal of the main suit the attachment falls with it.

3. Duration of Attachment

The attachment of the property continues only until final adjudication of the action for damage or indebtedness. Personal property attached under these statutes is strictly considered to be in the hands of the court, and to so remain in the possession of the court's officers, untouched by the attaching creditor (plaintiff) until the main issue is decided.

4. Grounds for Attachment

Attachment is appropriate in actions for the recovery of money or personal property, for the recovery of damages for wrongful conversion or detention of personal property or for the recovery of damages for injury done to either person or property.

It is available in actions against a corporation created under the laws of any other state, government or country, against non-residents of this State, against captains of sailing vessels in certain instances, and against a defendant (including corporations) who has absconded or concealed himself, or who is about to remove any of his property from the court's jurisdiction or who has or is about to assign or otherwise dispose of his property with an intent to defraud his creditors. (§ 15-19-10).

5. Property Subject to Attachment

A list of property subject to attachment is provided in § 15-19-220 and includes: rights or shares in any vessel or stock in an association or corporation, with interest or profits generated by them, and any real estate or personal property of the defendant which is located within the territorial jurisdiction of the magistrate. Certain property is exempt from attachment because it is subject to homestead and other exemptions, as described in Title 15, Chapter 41 of the Code. The list is these exemptions is quite lengthy and one should always refer to the Code when questions arise regarding these exemptions.

6. Attachment When Debt Not Yet Due

In certain instances, the remedy of attachment is available even though a debt is not yet due and owed to a plaintiff. Section 15-19-30 states that when a creditor-plaintiff shows by affidavit, that the "debtor" has departed the state with intent to defraud creditors or to avoid service of summons, or has concealed himself to accomplish the same, or that he has or is about to remove or dispose or assign his property with an intent to defraud his creditors a warrant of attachment may be granted as if the debt were due and payable at that time.

However, even though such attachment be granted and property attached, no judgment shall be had until after the maturity of the debt.

7. Filing of the Affidavit

After commencement of the main action by issuance of the summons and complaint, a plaintiff desiring the issuance of a warrant of attachment must file an affidavit with the magistrate in a form such as that provided in § 15-19-60.

The affidavit must state:

(1) That a cause of action exists;

(2) That a claim exists and in what amount (not to exceed $7,500.00);

(3) The grounds of the claim as stated in §§ 15-19-10 and 15-19-50 (detailed in part 4 of this material), and

(4) The identity of the defendant.

8. Bond Undertaking

Before issuance of the warrant of attachment, the magistrate must require a written undertaking on the part of the plaintiff, with sufficient surety, to guarantee that plaintiff will pay any costs of damages resulting from the attachment in the event that the attachment is dismissed by the court or judgment be for defendant in the main action. (§ 15-19-80).

The bond must be at least in the amount of $25 and in the form provided in § 15-19-90.

9. Issuance of Warrant of Attachment

Upon consideration of the affidavit filed by the plaintiff and receipt of a bond undertaking of a sufficient amount, the magistrate may make his final determination as to the issuance of the warrant of attachment.

Upon a determination by the magistrate that a warrant of attachment should be issued, the magistrate may issue the warrant of attachment in the form prescribed in § 15-19-110. The magistrate should also direct that a copy of the warrant of attachment, with the summons, be served on the defendant if he can be found within the county. (§ 15-19-70).

10. Attachment Procedure

The warrant should be directed to any sheriff of the county or the magistrate's constable requiring him to attach and safely keep all the property of the defendant who is named in the warrant which is found

within the county, or so much as is sufficient to satisfy the claim by plaintiff. (§ 15-19-100).

The officer to whom the warrant of attachment is directed should immediately proceed to attach all such property as is appropriate in conformity with § 15-19-230.

In addition, the officer should within a reasonable time make a written return to the magistrate on the warrant reporting his success or failure in obtaining attachment of defendant's property. (§ 15-19-270).

11. Disposition of Attached Property

If a judgment in the main action is ultimately in the plaintiff's favor, the constable or sheriff should proceed to satisfy the judgment from the attached property if it be money and may sell sufficient of the attached personal property (pursuant to a valid execution issued after judgment on motion of the plaintiff) to satisfy the judgment. (§ 15-19-350).

After the satisfaction of the judgment and all costs of the proceedings, any remaining residue of the attached property or proceeds of a sale should be returned to the defendant. (§ 15-19-370).

If, however, the main action is dismissed, or upon a final judgment in the defendant's favor, all attached property, proceeds, or bonds should be returned to the defendant, on request, and the warrant discharged. (§ 15-19-390).

At any time during the pendency of the main action, the defendant, or any person who establishes a right to any of the property attached pursuant to these procedures, may move to discharge the attachment. (§ 15-19-340).

12. Release of Attached Property

The defendant may appear at any time and move for an order discharging the attachment. The appearance may be general or special. (§ 15-19-300). An undertaking shall be required for the discharge. (§ 15-19-310).

I.
Enforcement of Civil Judgments

1. Generally

Once a magistrate's court judgment is rendered and notice of the judgment given the losing party, the losing party should immediately comply with the terms of the judgment. Since a magistrate may not punish a party for contempt for failure to obey a judgment of his court, he must resort to other methods of enforcement. If the judgment requires the turning over of personal property to another, as in a claim and delivery action, resort may be had to the remedy of execution. (S.C. Code Ann. §§ 22-3-1460 and 22-3-1470). Generally, where the court's judgment requires payment of money, the most common remedy in magistrate's court is execution.

Execution is defined as the remedy afforded by law for the enforcement and accomplishment of the terms of a judgment. Executions may be had against the property of the judgment debtor, against his person, and for the delivery of the possession of real or personal property, or such delivery with damages for withholding the property. (§ 15-39-10). Magistrate's judgments are enforced through the issuance of a writ of execution by a magistrate, or through circuit court. (See Procedure After Verdict).

2. Issuance of Execution

In the case of judgments docketed only with the magistrate who rendered the judgment, the prevailing party must apply to that magistrate for leave to issue a writ or order of execution (sometimes called a writ or order of enforcement) within three years of the rendition of the judgment. (§ 22-3-310). However, if a transcript of the judgment was requested of the magistrate and filed with any clerk of court by the prevailing party, application for the writ's issuance must be made to the circuit court within ten years of the rendition of the judgment. (§§ 15-39-20, 15-39-30, 15-39-90, 22-3-300, and 22-3-320).

3. Contents of the Execution

The execution should be prepared by the party creditor (the one to whom the debt is owed), or his attorney (Op. Att'y Gen. No. 3915 dated 1973-74). It must be directed to the magistrate's constable, sheriff (or coroner in certain instances), must be attested to by the magistrate, subscribed by the party issuing it, or his attorney, and must show the following:

> a) the judgment, b) the name of the court, c) the county in which filed, d) the names of the parties, e) the amount of the judgment if it be for money, f) the amount remaining due thereon, g) and the time of the docketing of the judgment in the county to which the execution is issued. (§§ 15-39-80, 22-3-320).

The execution should additionally direct the officer to carry out the instructions as detailed in one of subsections (1) through (4), of § 15-39-80.

4. Execution Against Property

If the judgment is for the recovery of money, the execution may be against the property of the losing party which can be found within the magistrate court's jurisdiction. (§§ 15-39-80, 22-3-310, and 15-39-40).

In any case in which a plaintiff has proceeded in attachment and property of the defendant is being

held by the court, upon the rendering of a judgment in the plaintiff's favor, the plaintiff should move to execute on the judgment, thereby allowing the sale of the attached property and the satisfaction of the judgment from the proceeds. (§ 15-19-350(2)).

5. Execution for Delivery of Specific Property

If the execution requires the delivery of specific personal property (as in claim and delivery), it must be issued in the county in which the judgment has been filed and a part or all of the property sought is located. (§§ 22-3-300, 22-3-1470, 15-39-80(4), and 15-39-40).

6. Execution Against the Person

An execution of arrest against a judgment debtor can be issued by a magistrate (§ 15-17-40) if the execution is returned unsatisfied (§ 15-39-50) and the action is of a type for which the defendant could be arrested as outlined in § 15-17-20. If the two requisites above are met and the judgment has only been filed with the magistrate, he may issue the execution against the person subject to the provisions of §§ 15-17-20 through 15-17-210. If the judgment was filed with the county clerk, the execution against the person should issue from the clerk.

7. Return of the Execution

In conformity with § 22-3-310, the constable or sheriff to whom the writ of execution was issued must make a return to the magistrate within sixty (60) days of the date of issuance. The return should state the results of the execution as set out in § 15-39-130, of either a full execution, a partial one, or a failure to execute.

J.
Judicial Sales

1. Generally

The conduct and procedure of a judicial sale is controlled by S.C. Code Ann. § 15-39-610 et seq. A judicial sale is used in magistrates' courts to satisfy an adjudicated claim by the sale of personal property taken from a losing party. The sale may be of personal property seized pursuant to a claim and delivery action, a distraint procedure, or as a result of a levy and execution. In some instances, the sale is made to satisfy the remainder of a claim only partially paid by the loser, but in every instance the sale is preceded by a judicial procedure and a final adjudication by the court against the owner of the property to be sold.

2. Sales Conducted by Officer

In most instances, the judicial sale is conducted by the constable, sheriff, or other officer to whom the original document authorizing seizure of the property was issued. However, in at least one instance (Repair and Storage Liens) magistrates are authorized to conduct the judicial sale themselves. (§ 29-15-10).

3. When Sales May Not Be Conducted

No judicial sale of property should be made until after the time for the filing of an appeal of a judgment is past, or until an appeal is heard and the judgment affirmed. (§§ 22-3-300 and 22-3-310). In claim and delivery actions, no sale should be made where a party has posted a bond for the property claimed. (§ 22-3-310).

4. Sales in Different Situations

While the procedures in the various types of judicial sales are similar, the existing differences merit separate discussions:

a. Seizure And Sale In Claim And Delivery Actions

A judgment for the plaintiff or the defendant in a claim and delivery action may be for "the possession, the recovery of the possession or the (recovery of) the value (of the property claimed) in case the delivery cannot be had, plus the damages for the detention." (§ 22-3-1460). On a judgment for the delivery of possession, an execution shall be issued requiring the officer (the constable or sheriff) to deliver the personal property. The execution may at the same time require the officer to seize sufficient personal property of the other to satisfy any costs or damages as determined by the procedure set out in § 22-3-1480, and allowed in the judgment. (§ 22-3-1470). It is here that caution is advised. Unless the damages and costs are substantial, the execution should not order a seizure of personal property as the property seized would necessarily have to be disposed through a judicial sale. Very often, the cost of the judicial sale of goods seized to satisfy minor costs or damages would outweigh the amount of the costs and damages. In such instances of minor costs or damages, it may be more prudent to allow the plaintiff to bear the costs.

If the judgment in the claim and delivery action is for the value of the property where it is unable to be delivered, the execution should direct the officer to seize personal property of the party sufficient to satisfy the value stated in the judgment. Here, the execution may

order the seizure to cover the value of any costs or damages ordered in the judgment, no matter how minor, since the seizure will necessitate a judicial sale anyway. (§ 22-3-1470). The judicial sale of property seized for either costs and damages alone, or for value plus costs and damages, must be made under the watchful eye of the magistrate (but not with his involvement or control), according to the statutes to insure the terms of his judgment are properly satisfied. The actual terms and procedures of the judicial sale upon the issuance of an execution, depends upon whether the execution issues to a constable or sheriff, or upon the existence of specific statutory direction. As the procedures for sales in claim and delivery and levied executions are the same, they are discussed as a part of the "attachment" discussion, while the procedure for sales in "distraint," as specially provided by statute, come within that section.

b. Seizure and Sale in Distraint Actions

Upon the proper findings of fact by the judge in a distraint action and the issuance of a distress warrant to a constable or sheriff, the officer should go to the premises of the tenant and seize such personal property (if not exempt from seizure) as is necessary to satisfy the value of the rent and costs. (§ 27-39-240). Within five days after such seizure, the tenant may free his property from the distraint by posting a bond payable to the landlord as directed in § 27-39-310.

Upon the failure of the tenant to post a bond within the required time, the officer may sell the property at a public auction (or judicial sale) to the highest bidder for cash. (§ 27-39-320). The officer must post a notice of such public auction, stating specifically the time and the place of such sale, upon the premises and two other public places in the county for five days. (§ 27-39-320). The landlord or anyone else may be a purchaser at the auction (§ 27-39-340), but any property purchased is taken subject to any existing lien for taxes. (§ 27-39-330).

Section 27-39-250 concerns the effect of property of others found on the premises. If any property distrained is not the property of the tenant, the tenant should immediately name the owner and inform the officer. When this occurs, § 27-39-250 should be referred to and followed. Although landlords can distrain property belonging to third parties located on the leased premises, this rule does not exist where there is a publicly recorded security interest which gives the landlord notice of exactly what property on the premises is unavailable to distrain. In Exparte J.M. Smith Corporation In re Greenwood Petroleum Co., Inc. v. Wingard, 341 SC 442, 535 S.E.2d 131, (SC 2000), the Supreme Court ruled that a prior perfected security interest has priority over a landlord’s lien.

c. Seizure and Sale on Executions

In actions in which a judgment has been rendered, and an execution issued and levied against the personal property of the defendant, or in which goods have been attached, and judgment and execution given, the sheriff or constable should satisfy the judgment out of the property attached.

In special instances of personal property seized pursuant to a writ of attachment that is perishable or too expensive to maintain, the property may be sold by the officer according to the conditions of § 15-19-280. However in situations in which a judgment has been rendered or a balance of a judgment is outstanding and an execution has been issued on the outstanding judgment, the sheriff or constable should satisfy that judgment through a judicial sale, under the direction of the issuing magistrate (§ 15-19-270), of the seized

property by paying to the plaintiff the proceeds of the sale of the property (§§ 15-19-350 and 15-39-610).

Under an execution issued to a constable which directs the seizure of personal property and ultimately a judicial sale, the procedure and terms of the sale are set out in § 22-9-110. That section, in addition to requiring that the officer file a list of every article seized with the magistrate issuing the execution, states that the constable must give "fifteen days notice by advertisement at two of the most public places in the neighborhood of the time and place of sale". The fee and commission received by the constable for carrying out the execution and sale are statutorily detailed in § 8-21-1060(7).

In the instance of an execution to a sheriff in which personal property must be seized and sold in a judicial sale, the procedure and terms of the sale are dictated by another set of rules found at § 15-39-610, et seq. Where the sheriff is responsible for the execution, he must specify "in an advertisement the property to be sold, the time and place of sale, the name of the owner of the property, and the party at whose suit the sale is to be made." (§ 15-39-660). The advertisement should be published at three public places in the county, one of which should be the courthouse door, and another in a newspaper, for a period of fifteen days prior to the day of sale (§§ 15-39-660, 15-39-650, and 15-29-60). Additional particulars of sheriff's judicial sales are set out in Chapter 39, Article V, at § 15-39-610, et seq.

d. Repair or Storage Liens

Magistrates have authority to conduct sales pursuant to § 29-15-10 to enforce repair and/or storage liens. Please refer to Section “O,” subsection “5” of the “Civil” section of this book for a detailed explanation of public sales conducted by magistrates pursuant to § 29-15-10.

K.
Action of Claim and Delivery

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 the property. Claim and delivery may not be used to recover ownership of real property, but may only be used to recover goods or personal property. Actions of claim and delivery 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 ($7,500.00). If the property's value exceeds that amount, recovery of the personal property may only be had through an action in the Circuit Court.

Replevin, detinue, and trover are three ancient common law remedies upon which the statutory remedy of claim and delivery is based. Claim and delivery, a mixture of elements of all three, is the statutory remedy found at S.C. Code Ann. § 22-3-1310, et seq.

Claim and delivery borrows from replevin in that it is a remedy which contemplates the recovery of specific personal property when possible. It borrows from the action of trover in that it allows the recovery of the value of the property when delivery of that property is not possible. The primary relief sought in claim and delivery is the return of possession of the specific property and only where the property is not recoverable, or recoverable in a state of repair of substantial value, may the value itself be awarded or recovered. (§ 22-3-1310, et seq., also see Reynolds v. Philips, 72 S.C. 32, 51 S.E. 523, 524 (1905); for recovery of value where recovery of actual property may not be had see Wilkins v. Willimon, 128 S.C. 509, 122 S.E. 503 (1924)).

Only certain property is subject to recovery through claim and delivery. The property must be personal, rather than real property. It must be "moveable and capable of identification," and certainly must be in existence and of substance able to be seized. (See 18 S.C. Law Quarterly 240).

A claim and delivery action cannot be maintained by one who does not have a general or specific property interest in the thing taken or detained. This means that in order for a party to be able to maintain an action for claim and delivery, the plaintiff at the time of commencement of the suit must be entitled to the immediate possession, and may not recover on the weakness of his adversary's title or right possession. (See 18 S.C. L.Q. 240 at 244, also Byrd v. O'Hanlin, 1 Mill. Const. 401 (S.C. 1817)).

A common illustration of a proper claim and delivery action is where a security agreement, installment contract, or an installment has been signed for the purchase of an automobile and there has been a default in payments by the purchaser. Provisions in the security agreement or installment contract that allow the seller or lender to take immediate possession of the automobile when the buyer defaults and wrongfully detains it are enforced by an action of claim and delivery, if the value of the car is $7,500.00 or less.

It is essential that magistrates understand that claim and delivery is not proper in general sales contracts in which no reservation of title is retained by the seller (where no specific property is used as collateral), nor may it properly be used to collect a debt or an unpaid portion of a sales agreement.

Another example of a situation in which a claim and delivery action is proper is one in which the property has been loaned to or borrowed by someone other than the owner, and the person in possession refuses to return the property to the owner.

1. Jurisdiction and Venue

Because claim and delivery is an action in which jurisdiction depends on the location of the property sought, the property must be within the state. Venue (the proper place for the matter to be initiated or determined) is only proper in the county in which the property is located; however, note that a diligent effort at service of the summons and pleadings on the defendant must be made. (See 18 S.C.L.Q. 240, at 245).

2. Claiming Delivery

When the recovery of personal property is desired, the plaintiff may institute an action of claim and delivery along with the action that will ultimately determine ownership of the personal property. The claim and delivery action may be of several types, each distinguishable from the other by its effect on the possession of the personal property and the immediacy of dispossession.

A reasonable interpretation of the claim and delivery statutes reveal four basic actions:

1) Claim and delivery upon showing of danger or destruction or concealment (§ 22-3-1380); upon a determination by magistrate, based upon affidavit, property may be immediately seized and held by officer. (This is true immediate dispossession).

2). Claim and delivery upon showing of waiver (§ 22-3-1360); upon showing of knowing and voluntary waiver by person in possession, shown by claimant by affidavit, magistrate may order delivery of property to plaintiff-claimant. (This is the only true situation of immediate delivery to plaintiff - this will normally be based on a waiver clause in a written contract).

3) Claim and delivery for immediate dispossession (§ 22-3-1330); Defendant in possession is given notice of a right to a preseizure hearing which must be requested within 5 days of date of service or at the end of the five days he may be immediately dispossessed of the property which is held by the officer; the ultimate ownership of the property is determined at a trial held at a date set from 5 to 20 days after service of summons.

4) 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 thereof.

3. Requirements

A. Claim and Delivery Upon Showing of Danger of Destruction or Concealment

a) an affidavit in conformity with § 22-3-1320.
b) an affidavit showing probable danger of destruction or concealment. (§ 22-3-1380).
c) a written undertaking in double the value of such property. (§ 22-3-1330(a)).
d) a notice of an opportunity for a hearing for repossession which must be requested within 5 days of the service of all papers and the seizure. (§ 22-3-1330(b)).
e) a summons requiring the defendant to appear before the magistrate at a date set not less than five nor more than 20 days from date of service and seizure for the purpose of determining permanent possession. (§ 22-3-1330(c)).

B. Claim and Delivery Upon Showing of Waiver

a) an affidavit in conformity with § 22-3-1320.
b) an affidavit which shows that the defendant has in writing by contract or separate written instrument voluntarily, intelligently, and knowingly waived his right to a hearing prior to repossession of property. (§ 22-3-1360).
c) a written undertaking in double the value of such property. (§ 22-3-1330(a)).
d) a notice of an opportunity for a hearing for repossession which must be requested within 5 days from date of service and seizure.
e) a summons requiring the defendant to appear before the magistrate at a date set not less than 5 nor more than 20 days from date of service and seizure of property for the purpose of determining permanent ownership. (§ 22-3-1330(c))

C. Claim and Delivery for Immediate Dispossession

a) an affidavit in conformity with § 22-3-1320.
b) a written undertaking in double the value of the property. (§ 22-3-1330(a))
c) a notice of a right to pre-seizure hearing (§ 22-3-1330(b)) that notifies the defendant that he must request a hearing within 5 days of service or he may be immediately dispossessed of property at the end of 5 days.
d) an order restraining defendant from damaging, concealing, or removing property. (§ 22-3-1370)
e) a summons requiring the defendant to appear before the magistrate at a date set not less than 5 nor more than 20 days from date of service for the purpose of determining permanent possession. (§ 22-3-1330(c))

D. Claim and Delivery for Possession

a) an affidavit in conformity with § 22-3-1320.
b) an order restraining defendant from damaging, concealing, or removing property (§ 22-3-1370)
c) a summons requiring the defendant to appear before the magistrate at a date set not less than 5 nor more than 20 days from date of service for the purpose of determining permanent possession. (§ 22-3-1330(c))

4. Actions for Immediate Seizure

The immediate seizure or dispossession of the claimed property from the party in possession occurs only in situations I and II as noted below.

Only in situation II (upon a showing of waiver by affidavit) may the claimed property be immediately seized and turned over to the plaintiff claiming the property; in the remaining situations or seizure prior to final trial (I and III), the property, once seized, is held by the constable or sheriff until ownership is determined at final trial.

The papers which must be made out and served on the party in possession prior to seizure are as shown below:

Situation I	**Situation II**
basic affidavit	basic affidavit
affidavit of danger	affidavit of danger
undertaking (bond)	undertaking (bond)
notice of right to repossession hearing	notice of right to repossession hearing

summons	summons

5. Actions for Later Seizure

In situation III and IV, seizure occurs after a pre-seizure hearing (III) or upon final trial (IV). In situation III, the taking of possession of property may occur only after a notice of a right to pre-seizure hearing is given, and one is held (and possession for plaintiff given) or upon the defendant's failure to request a hearing within the proper time.

In situations in which plaintiff does not seek seizure of property until final trial, situation IV is applicable. In this situation, since there is no danger of damage to any party resulting from seizure of the property, no undertaking is required.

The papers which must be made out and served on the party in possession to initiate the action are shown below:

Situation III	**Situation IV**
basic affidavit	basic affidavit
undertaking (bond)	order restraining damage for damage or removal
notice of right to pre-seizure hearing	summons
order restraining damage or removal	
summons	

6. Filing for Affidavit

Before the magistrate allows the filing of the affidavit, the first step of the claim and delivery procedure should be an inquiry by the magistrate as to whether the plaintiff has demanded return of the property from the defendant. Often the mere demand of the property will result in its return. No demand by the plaintiff is required where the property has been wrongfully taken or withheld. The affidavit, required by § 22-3-1320, made by the plaintiff, his agent or attorney, must show:

a) That the plaintiff is the owner or is entitled to immediate possession of the property claimed, with a detailed description of the property. The 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.

b) That the property described is wrongfully withheld or detained by the defendant.

c) The cause of the withholding of the property by the defendant to the best knowledge, information, and belief of the person making the affidavit.

d) That the property has not been taken for any tax, fine, or assessment, or seized by an action of execution or attachment against the plaintiff (and if so seized that such property should have been exempt from such seizure).

e) The actual value of the personal property (which must be $7,500.00 or less for magistrates to retain jurisdiction - § 22-3-1320) as determined by the affiant.

The affidavit, containing the above information, and signed by the person making it, should then be filed with the magistrate in each of the four claim and delivery situations.

In two of the previously noted claim and delivery situations, an additional affidavit is required, or the additional required information should be contained in the basic affidavit.

7. Waiver of Right to Pre-seizure Hearing

If a person having possession of personal property has waived the right to a pre-seizure hearing (situation II), the magistrate may order immediate seizure and delivery of the property to the plaintiff upon proof of such waiver. (§ 22-3-1360).

Waiver by a defendant may be proven by an affidavit showing that the defendant, in writing, by contract or by separate written instrument, voluntarily, intelligently, and knowingly waived his right to a hearing prior to the repossession of such personal property.

The affidavit must be served on the defendant with the summons and other required affidavit, the bond undertaking, and a notice of right to a hearing for repossession. (§ 22-3-1390).

8. Affidavit of Danger of Destruction or Concealment

The magistrate in situation I may order immediate seizure of personal property without the necessity of a pre-seizure hearing. Upon a showing, supported by affidavit, of facts sufficient to cause the magistrate to believe it probable that the property at issue is in immediate danger of destruction or concealment by its possessor, the magistrate may order immediate seizure, prior to any hearing or notice. (§ 22-3-1380).

This affidavit must be served on the defendant with the undertaking and notice of right to a hearing for repossession (§ 22-3-1390), along with the other appropriate papers, at the time of seizure of the property by the officer. Upon such a seizure the property should be held by the seizing officer.

9. The Bond Undertaking

The requisites of the bond undertaking are set out in § 22-3-1330(a). It must be a written undertaking, executed by one or more different sureties, to the effect that they are bound in double the value of the personal property as stated in the affidavit, until final adjudication of the action, and they do guarantee the return of the property to the defendant if judgment be for the defendant. The sureties also guarantee the payment to the defendant of any sum awarded to the defendant against the plaintiff. The undertaking should be approved by the magistrate by signature. The defendant may make written exception to the sureties at any time at least two days before the return day of the summons pursuant to the terms of § 22-3-1340, whereupon the plaintiff must give further proof of surety.

The bond undertaking is required in all but situation IV. The purpose of requiring the undertaking is to provide a fund out of which damages resulting from seizure may be had, and since no seizure prior to final trial occurs in situation IV, no undertaking is required.

10. Notice of Right to a Hearing

The continuing development of the due process concept has resulted in the requirement that a party in possession of property claimed by another must be given an opportunity for a pre-seizure hearing (§ 22-3-1330(b)), except where proof of waiver or danger of damage or concealment is shown by

affidavit. The notice of the right to a pre-seizure hearing must notify the party that he must, within five days of service of the notice, demand a hearing.

The pre-seizure hearing is held for the purpose of protecting the defendant's use and possession of property from arbitrary encroachment. At the hearing the defendant must answer the allegations of the affidavit of the plaintiff. If the magistrate, at the end of the hearing, should find that the plaintiff's claim for immediate possession is probably valid and the defendant has no overriding right to continued possession of the property, then the magistrate may allow the plaintiff's claim by endorsing upon the affidavit a direction to any constable of the county in which the magistrate presides, requiring such constable to take the property from the defendant and maintain it in a safe place. (§ 22-3-1350).

If the defendant should have failed to demand a pre-seizure hearing, or should fail to appear at the hearing after demand was made, the magistrate may base his decision on the presentation made by the parties present and rule accordingly.

In viewing the broad concept of due process, it appears that a hearing for repossession of the property after seizure is wise in those situations where no opportunity for hearing prior to seizure was offered (situations I and II). The notice of a right to a hearing for repossession should be offered in the same manner as the pre-seizure hearing, with the same five day period within which the party dispossessed must request the hearing. If the hearing is held, the defendant should be given the opportunity to refute the plaintiff's showing of waiver or danger. Upon the party's failure to so request, the possession of the property must remain in the hands of the court officer or plaintiff, depending upon the situation (I or II), until ownership is determined at the final trial.

11. Order Restraining Damage or Concealment

In actions (such as situation III and IV) in which immediate seizure is not sought by plaintiff, the magistrate should serve upon the party in possession an order restraining that party from damaging, concealing, or removing the described property. (§ 22-3-1370).

If such an order is violated, the defendant may be fined in an amount not to exceed $100 or imprisoned for not more than 30 days. An arrest warrant should be issued in order to bring the defendant before the court.

12. Summons

The summons is the initiation of judicial process to ultimately determine permanent ownership of the personal property.

The summons, issued by the magistrate and served upon the defendant, must require the defendant to appear before the magistrate at a time and place shown on the summons. The time set by the magistrate for this final trial on the issue of permanent possession and ownership may not be less than five days nor more than twenty days from the date of service (§ 22-3-1330(c)).

The summons should additionally contain a notice to the defendant that his failure to appear at the time and place set in the summons could result in judgment for the possession of the property in the plaintiff's favor, in addition to the levying of costs and disbursements of the action against the defendant.

13. Service of Papers

Upon the making out and filing of all the required papers, the magistrate should direct that the constable or sheriff attempt to locate the defendant or person in possession of the personal property and carry out the directions of the magistrate, whether it be merely service of the summons and other appropriate papers, (as in situation III or IV), or the taking of immediate possession of the property as in the situations of waiver (II) or of danger to property (I).

If the defendant cannot be personally served, the summons and papers may be served upon the defendant's agent in whose possession the described property may be found. If neither the defendant nor his agent can be located, he can be served by leaving copies of all papers at his place of business, or with a person of discretion at his last place of residence. (§ 22-3-1410).

If the defendant cannot be found and has no last place of abode, nor any agent or person in possession can be located, the magistrate may proceed with the cause as if personal service had been made. (§ 22-3-1400). Seizure in conformity with the above situations may be ordered by the magistrate if the property can be located.

14. Return of Property to Defendant After Seizure

At any time after seizure, but prior to the date of final trial, the defendant may have the property returned to his possession upon the filing with the magistrate of an undertaking in double the value of the property. (§ 22-3-1440).

15. Judgment and Seizure

Seizure at the direction of the magistrate may occur as a result of a failure of defendant to demand a pre-seizure hearing within the allowed time (§ 22-3-1330), upon a finding in plaintiff's favor at such a hearing (§ 22-3-1460). Seizure may also occur in situations of waiver, (§ 22-3-1360) or upon a showing of danger or concealment. (§22-3-1380). The judgment for plaintiff may be for the continued possession of the property, recovery of possession, or recovery of the value of the property, as well as for damages resulting from the defendant's withholding of the property. (§ 22-3-1460). If possession of the property has been delivered over to the plaintiff, and the judgment is for the defendant, the defendant may claim a return or the value if a return cannot be had plus damages pursuant to § 22-3-1460.

If desired by the party, an execution should be issued on any judgment (§§ 22-3-1470 and 22-3-1480), which upon the endorsement of the affidavit by the magistrate, directs the constable or sheriff to take whatever action is appropriate (seize specific goods and deliver or retain, or seize goods for the purpose of satisfying the value and costs awarded).

16. Seizure of Property

Upon the endorsement of the magistrate on the affidavit which directs the constable or sheriff to seize the certain property (or property sufficient to equal the claimed property's value), that constable or sheriff should immediately locate and seize the property, if within the county. (§ 22-3-1410).

If the property is believed or known to be in a building or enclosure (shed, barn, etc.), the constable or sheriff should publicly demand its delivery from the persons in control of the premises. If the property is not given over, the sheriff, or the constable, may break and enter the premises by the least destructive means and seize the property. (§ 22-3-1420). If it appears no one is at the premises, it is suggested that the officer return at a later time, in the hope of gaining access to the property without the necessity of breaking and entering. (Op. Att'y Gen. No. 1720, dated 1963-64). Upon the seizure,

he should follow the directions contained in the magistrate's endorsement by either retaining possession or delivering the property to the party to whom it was so directed. (§ 22-3-1430).

17. Notice of Right to Cure

In a transaction between a creditor and a consumer, the creditor cannot repossess the collateral until he sends a notice of Right to Cure pursuant to §§ 37-5-110 and 37-5-111. This also pertains to Rent-to Own transactions. Please note that Federally-Chartered credit unions are excluded from this requirement. See § 37-1-202 (10).

Before a creditor may file an action for claim and delivery the debtor must be in default for at least ten days as defined by § 37-5-109. The creditor must also send notice pursuant to §§ 37-5-110 and 37-5-111. The notice must state the name, address and phone number of the creditor, a brief description of the credit transaction, the consumer's right to cure the default, and the amount of the payment and date by which the payment must be made. If the debtor does not "cure" the default within twenty days, the creditor may proceed with the action.

18. Claims of Third Parties

If the property which is the object of the claim and delivery action be claimed by a third party, that party should be allowed to enter the action by filing an affidavit as to their right to title and possession. (§ 22-3-1450). Their claim to possession should be considered with those of the plaintiff and defendant at the final trial.

19. Self-help by Owner

Upon a default in payment, an owner-claimant who has retained a security interest in personal property can reclaim possession without judicial process; so long as the property can be taken without breach of the peace. (§ 36-9-503).

L.
Elements of Common Contract Actions

1. Generally

A contract is defined generally as an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act. Stated another way, there must be an offer and an acceptance accompanied by valuable consideration. These principles govern contract formation.

An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. Restatement (Second) of Contracts § 24 (1981). The offer identifies the bargained for exchange and creates a power of acceptance in the offeree. Restatement (Second) of Contracts § 29 (1981). An acceptance is the exercise of power conferred by an offer by performance of some act.

Generally, a contract may be either oral or written. In some instances the law requires the contract to be in writing in order to be enforceable. For example, if an oral contract is incapable of performance within a year or if it is an oral contract for the sale of land, it is barred by the Statute of Frauds. (See § 32-3-10).

2. Parole Evidence Rule

The parol evidence rule states that "where the terms of a written instrument are unambiguous, clear and explicit, extrinsic evidence of statements made contemporaneously with or prior to its execution are inadmissible to contradict, vary or explain its terms." Ray v. South Carolina Nat'l. Bank, 281 S.C. 170, 314 S.E.2d 359 (1984). In certain situations of ambiguity of terms, parol evidence may be used to explain the terms of the agreement.

3. Defenses

The following comprises a list of some but not all the defenses available in contract actions:

a) Capacity
The parties to the contract must be competent to make a contract, and not incapacitated by mental incompetency, infancy, or the like.

b) Statute of Frauds
Any contract for an interest in land or any agreement that is not to be performed within one year must be in writing and signed by the party against whom it is seeking to be enforced. (§ 32-3-10(4)). Failure to put such a contract in writing renders it void. (§ 27-35-20). Moreover, a contract required to be in writing by the Statute of Frauds cannot be orally modified. Windham v. Honeycutt, 279 S.C. 109, 302 S.E.2d 856 (1983) (court held evidence of oral modification of the real estate contract as violative of the Statute of Frauds).

c) Failure of Consideration
A promise not supported by any consideration (defined as some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, or loss suffered or undertaken by another) does not amount to an enforceable contract. There is a failure of consideration when one party has not received the value, performance or promise of the other party, nor has he undertaken or suffered any loss or encumbrance.

d) Caveat Emptor (Let the buyer beware)
The purchaser of goods is charged with the duty to examine and judge the fitness of such goods prior to purchase. If the seller has not warranted the condition of the goods, or if the contract of sale included a clause that the purchaser would accept the goods "as is," the seller can invoke the doctrine of caveat emptor as a defense to a complaint by the purchaser that the goods are defective. However, caveat emptor cannot protect a seller who is guilty of fraud in concealing the defects from the purchaser. MacFarlane v. Manley, 274 S.C. 392, 264 S.E.2d 838 (1980).

4. Uniform Commercial Code

The Uniform Commercial Code (UCC) is the body of rules contained in Title 36 of our codes which was established for the purpose of governing commercial transactions (including sales and leasing of goods, transfer of funds, commercial paper, bank deposits and collections, letters of credit, bulk transfers, warehouse receipts, bills of lading, investment securities, and secured transactions).

M.
Elements of Common Tort Actions

1. Generally

A tort is defined as a private wrong or injury done to person or property for which a legal remedy is afforded. A tort arises where there is 1) a duty of due care; 2) a breach of that duty--i.e. negligence; 3) a legally protected injury; and 4) a causal relationship between that injury and the negligence such that the negligence "proximately caused" the injury. A wrongful act may be a breach of a contract, a crime punishable by law and a tort. A tort compensates victims, while criminal law punishes wrongdoers.

For example, if a person assaults and injures another person, the injured party may institute two separate and distinct actions, one civil and one criminal. The civil action designated as a tort will be for a money judgment against the defendant seeking to be compensated for his damages. Damages may include hospital bills, compensation for lost income if the injury prevented a return to work, and in some instances, compensation for the injured party's pain and suffering.

A criminal action may also be instituted for assault and battery. In this action, the theory is that the defendant has committed a wrong against society.

Whether the defendant breached his duty of due care (or some other related duty) and proximately caused the plaintiff's injury is a mixed question of law and fact to be determined at trial. The judge should provide a proper charge and direct a verdict only where there is no evidence upon which a reasonable juror could decide otherwise.

A tort may be inflicted either negligently or intentionally. The legal definition of negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. In judging whether conduct is negligent, the law applies objective standards of reasonableness. The question is what would a reasonable person have done under the same circumstances.

An intentional tort is an act committed with a particular state of mind. Intent is defined as the desire to cause certain immediate consequences. Certainty of the harmful consequences is what distinguishes intentional torts from negligent or reckless ones. Common intentional torts include Battery, Assault, False Imprisonment, Intentional Infliction of Emotional Distress, and Trespass to Land.

N.
Elements of Common Landlord-Tenant Problems

1. Generally

The relationship of landlord and tenant is always based upon a contract, whether oral or written, which determines the rights and responsibilities each party has and owes to the other.

Usually, the agreement between the parties takes the form of a lease, by which the tenant gains possession and use of the premises during the term of the lease, and in which the terms of the landlord-tenant relationship are spelled out.

Tenancies may be for a specific term of period of time (for a year), or for a periodic term and are automatically renewable (month to month), or tenancies may be at will (in which the lease stands so long as the parties desire it to or until such time as they wish to end it).

The lease usually provides for specific aspects of the landlord-tenant relationship such as subleasing, means of notice, termination, rent payments, and responsibility for repair and maintenance.

If the tenant fails to pay the rent, the landlord can terminate the lease, force the tenant to vacate the premises, and recover any rent due.

2. Jurisdiction of Magistrates

Magistrates have jurisdiction as to those landlord-tenant matters which may be brought pursuant to the provisions of Chapters 33 to 41 of Title 27 of the Code, regardless of the dollar-amount in controversy. While all of the chapters referenced above are important, special attention should be given Chapter 37, Ejectment of Tenants, Chapter 39, Rent, and Chapter 40, South Carolina Residential Landlord and Tenant Act (SCRLTA). When dealing with mobile homes or trailers, reference should be made to the Manufactured Home Park Tenancy Act found in Chapter 47 of Title 27 of the Code.

As to any action brought in a magistrate's court for past due rent not brought as an action for distraint or ejectment, such action must be brought pursuant to one of the jurisdictional grants of authority, other than that as to landlord-tenant matters, provided by S.C. Code Ann. § 22-3-10. As to such an action, the general $7,500.00 monetary limitation on a magistrate's jurisdiction would apply.

As to any action brought in a magistrate's court to recover sums due under an acceleration clause in a lease, such action must be brought pursuant to one of the jurisdictional grants of authority, other than as to landlord-tenant matters, provided by § 22-3-10. As to such an action, the general $7,500.00 monetary limitation on a magistrate's jurisdiction would apply. See Op. Att'y Gen. dated January 14, 1982.

3. Eviction or Ejectment

a. Generally

A landlord may bring an action of ejectment against a tenant in these situations: (1) when the tenant fails or refuses to pay the rent when due, (2) when the term of tenancy or occupancy ends, or (3) when the terms or conditions of the lease are violated. (See § 27-37-10). Provisions in the SCRLTA provide the following additional grounds for a residential

ejectment: noncompliance with the rental agreement, §27-40-710; failure to pay rent, §27-40-710; noncompliance affecting health and safety, §27-40-720; and absence, nonuse and abandonment, §27-40-730. Always consult the statute before acting. For specific grounds for ejectment under the Manufactured Home Park Tenancy Act, see §27-47-530.

Once an action for ejectment is begun for failure to pay rent, the landlord is under no obligation to accept past rent if offered by the tenant.

b. Commencing Ejectment

The procedure of ejectment commences upon the filing of an application for ejectment with any magistrate having territorial jurisdiction over the area in which the premises are located. (§ 27-37-20). The magistrate must determine whether a landlord-tenant relationship exists and what rent, if any, is due.

The magistrate should, upon making a determination that rent is due, issue a written rule requiring the tenant to vacate the premises or to show cause within ten days why he should not be ejected. (§ 27-37-20). The rule should be personally served on the tenant whenever possible. Special rules for service of process are set out in § 27-37-30. Section 27-37-30 authorizes service of the Rule to Show Cause by posting and mailing after two prior attempts to serve the rule have been unsuccessful, and provides specific procedures for service prior to posting and for mailing. Section 27-37-30, as amended, provides alternative methods of service of rules to show cause in ejectment proceedings.

Subsection (A), as amended, provides that service of the rule to show cause should initially be attempted "in the same manner as is provided by law for the service of the summons. . . ." Those methods are personal service, certified mail, and publication. See Rule 4, SCRCP.

Subsection (B) addresses an alternative procedure for service in abandonment situations and provides that "[w]hen no person can be found in possession of the premises, and the premises have remained abandoned, as defined in Section 27-40-730, for a period of fifteens days or more immediately before the date of service, the copy of the rule may be served by leaving it affixed to the most conspicuous part of the premises." The ten days commences on the first day after the posting.

Subsection (C) provides an alternative procedure for service when service under subsection (A) has been unsuccessful after three attempts and abandonment is not an issue. The procedures set forth in (C)(1), (C)(2), and (C)(3) must be strictly followed before service is complete.

(C)(1) requires that two attempts be made to personally serve the defendant, and each attempt must be "separated by a minimum of forty-eight hours and must occur at times of day separated by a minimum of eight hours." For example: If the first attempt at service is made on Monday at 8:00 a.m., the second attempt could not be made earlier than Wednesday at 4:00 p.m. The person attempting to serve the rule must document the date and time of the attempts by affidavit or by certificate in the case of a law enforcement officer. On the first unsuccessful attempt to serve the rule, a copy of the rule must be affixed to the most conspicuous part of the premises. On the second unsuccessful attempt to serve the rule, the documentation of the two attempts to serve the rule must be attached to the copy of the rule when it is affixed to the most conspicuous part of the

premises.

To complete service under this subsection, (C)(2) requires that a copy of the rule and the documentation of prior attempts at service be mailed to the defendant. The clerk must verify the contents and propriety of the mailing, and a fee as provided for in Section 8-21-1010(14) ($5.00) may be collected for this service. The clerk's verification must be part of the record in the case, and service by ordinary mail is not considered complete with- out the clerk's verification. Finally, (C)(3) provides that the ten days for the tenant to answer and show cause does not begin until the eleventh day after mailing. However, if the tenant contacts the magistrates court prior to the eleventh day, the specified time period for the tenant to show cause as provided in Section 27-37-20 must begin to run at the time of contact.

c. Acrual of Rent

Even after service of process, rent continues to accrue so long as the tenant remains in possession, and the tenant is liable for the continually accruing rent. Even if the landlord accepts rent offered after service of process, the landlord may still insist and have ejectment of the tenant since the rights of the parties at the time of issuance of the rule are controlling. (§ 27-37-150).

d. Failure of Tenant to Appear

If the tenant neither vacates the premises nor appears within the time demanded by the rule to show cause (within ten days) the magistrate may then issue a written warrant of ejectment. Section 27-37-40. 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.

The magistrate's constable or sheriff of the county may then proceed to the premises, and present to the occupant(s) of the premises a copy of the writ and give the occupants twenty-fours to vacate voluntarily. If the occupants refuse to vacate within the twenty-four hours or the premises appear unoccupied, the constable or deputy sheriff shall announce his identity and purpose. If necessary, the deputy sheriff, but not a constable, may enter the premises by force, using the least destructive means possible, and remove the tenants and all property not otherwise belonging on the premises. The property should be deposited on the roadside. §27-40-710(D).

In executing the writ, if the premises appear to be occupied and the occupant does not respond, the constable and deputy sheriff shall leave a copy of the writ taped or stapled at each corner and attached at the top of either the front or back door or in the most conspicuous place. Twenty-four hours following the posting of the writ, if the occupants have not vacated the premises voluntarily, the deputy sheriff, but not a constable, may then enter the premises by force, using the least destructive means possible, and remove the tenants and all property not otherwise belonging on the premises. The property should be deposited on the roadside. §27-40-710(D). Discretion may be exercised by the constable or deputy sheriff in granting a delay in the dispossession of ill or elderly tenants.

> "In carrying out the execution of the Writ, where a forcible entry or removal must be made, we strongly advise that the constable should seek the assistance of regular deputies of the county in carrying out the mandate of the Writ. Constables and deputies should be confident of the appropriateness of the prior procedures and conservative in the execution of the Writ.
>
> "Since the uninvited entry of a tenant's premises by law enforcement officers is a situation potentially troublesome, good sense and caution should always be exercised. Adequate announcement of one's presence, identity, and purpose should precede any entry. If the entry is accomplished by force or breaking, it should always be by the least destructive means possible. Good sense and fairness should always be the rule. When confronted with a situation when called upon to dispossess tenants who might be ill or elderly, discretion would dictate that some delay in executing the warrant might be appropriate.

"All law enforcement officers should be cognizant of the potential ramifications and legal liabilities which could result from improper procedures or from the use of excessive or unreasonable force. In any event, the law only authorizes such force as is necessary to carry out the mandate of the Writ." (§ 27-37-40; Op. Att'y Gen. No. 79-7 dated 1979).

e. Trial for Ejectment

If the tenant appears to show cause, the magistrate should hold a trial in the same manner as any other civil action, allowing a trial by jury if demanded by either party. (§§ 27-37-60, 27-37-80). If a jury trial is requested by the tenant in a residential eviction, please see §27-40-790 concerning payment of rent pending trial. If a jury trial is requested by the tenant in a commercial eviction, please see §27-37-155, concerning payment of rent pending trial.

Upon a verdict for the landlord, the magistrate should issue a writ of ejectment and possession within five days, and the tenant should be ejected by the constable or sheriff. (§ 27-37-100). The constable or deputy sheriff should give the occupants 24 hours to vacate voluntarily. If the occupants refuse to vacate within 24 hours or the premises appear unoccupied, the constable or deputy sheriff shall announce his identity and purpose. If necessary, the deputy sheriff, but not a constable, may then enter the premises by force, using the least destructive means possible, in order to effectuate the ejectment. (§ 27-37-160). Again, any property may be deposited on the nearest roadside. §27-40-710(D).

When evicting tenants under the Manufactured Home Park Tenancy Act, refer to §27-47-530 for specific time requirements which are not applicable to a typical residential eviction.

If the verdict is in the tenant's favor, he may remain in possession of the property until the termination of his tenancy according to the agreement or by law, or until he fails to pay rent or is ejected upon another proceeding. (§ 27-37-110).

f. Appeal of the Verdict

Either party may appeal the decision (§ 27-37-120) but if the tenant does so, he must post an appeal bond, the amount of which is determined by the magistrate. The tenant must post this bond within five days after the service of the notice of appeal or the appeal

should be dismissed by the magistrate. (§ 27-37-130). In an appeal from a residential ejectment, please see §27-40-800 concerning posting a bond, signing an undertaking and paying rent pending the outcome of the appeal. A tenant who is wrongfully dispossessed may bring an action for damages against the landlord. (§ 27-37-140). However, if the tenant is dispossessed as a result of an unreversed judgment in an ejectment action, he will be estopped from claiming damages, except for the use of excessive force.

4. Collection of Rent by Distraint

Distraint or distress, is the remedy provided for in § 27-39-210 et seq., by which the landlord may request the magistrate to have a sheriff or constable upon the premises of the tenant and seize certain property found there, to be held until such time as the rent is paid. Certain property is specifically exempt from that which may be seized for the purposes of distress - personal clothing and food within the dwelling, bedsteads, and bedding and cooking utensils. (§ 27-39-230). If the rent remains unpaid, the distrained property may be sold, as described below, and the proceeds applied toward satisfaction of the rent due.

a. Commencement of Distraint Proceeding

A landlord may enforce collection of rent by making an affidavit before the magistrate having territorial jurisdiction over the area in which the premises occupied are located. The affidavit should set forth the amount of rent due. In addition, a notice directed to the tenant stating the alleged amount of rent due plus costs and setting the time and place for the holding of a pre-distress hearing should be prepared. The hearing may not be held less than five days after the service of the notice. (§ 27-39-210).

b. Service of Process

The notice and affidavit should be delivered to the magistrate's constable or a sheriff for service upon the tenant. They should be personally delivered to the tenant or if he is unable to be found, to any agent of the tenant in whose possession the property sought to be distrained is located. Other rules of service of papers upon tenants not able to be located are found in § 27-39-210.

c. Pre-Distress Hearing

If the magistrate, after conducting the hearing, determines that the landlord's right to distress is valid and the tenant has no overriding right to continue in possession of the property subject to distress, then the magistrate may issue his distress warrant naming the amount of rent due, with costs. (§ 27-39-220). The warrant should be delivered in the same manner and according to the rules as applicable to service of the affidavit and notice.

d. Enforcement of Distress Warrant

The officer charged with the responsibility of service of the distress warrant should immediately seek out and demand payment of the rent, plus costs, from the tenant or occupants of the premises. (§ 27-39-240).

If the tenant pays the amount demanded, the officer should make a return to the magistrate of the amount collected, whether in partial or total satisfaction of the judgment.

The magistrate should then make the disbursement to the landlord.

Upon the refusal of the tenant or occupant to pay the amount of rent determined by the judgment and shown on the distraint warrant, the officer should return to the magistrate to report the tenant's refusal to make payment. A distress warrant does not authorize forcible entry. In this situation, the landlord-plaintiff must begin an action in claim and delivery (if not begun previously at the time of the filing of the distraint affidavit). Op. Att'y Gen., No. 79-7; citing State v. Christensen, 194 S.C. 131, 9 S.E.2d 555 (1940); Burnett v. Boukedes, 240 S.C. 144, 125 S.E.2d 10 (1962).

The affidavit in claim and delivery must specifically describe the property found on the premises that is to be seized. The value of the seized property should be equal to the amount (or unpaid balance) of the judgment. (§ 22-3-1320). If the magistrate determines that a claim and delivery is proper, the normal jurisdictional limits, procedures, and time requirements as prescribed in the Claim and Delivery section of this Bench Book should be followed.

If the claim and delivery procedure is not initiated until the issuance of the distraint writ and refusal of the tenant to pay or surrender property, the normal claim and delivery procedures should again be followed, with respect given to all time restraints.

e. As to Property Distrained

The amount of property distrained must be reasonable in respect to the amount of distress (§ 27-39-240), and landlords are liable for damages for unreasonable distress. (§ 27-39-300). Property of the tenant should be first seized for the purpose of satisfaction of the rent demands, except for certain exempt property (§ 27-39-230), but property belonging to persons other than the tenant which is upon the premises may be distrained if the tenant's property is insufficient to satisfy the rent demands. (§ 27-39-250). However, this rule does not apply where there is a publicly recorded security interest which gives the landlord notice of exactly what property on the premises is unavailable to distrain. A prior perfected security interest has priority over a landlord's lien. Ex Parte J. M. Smith Corporation, 341 SC 442, 535 S.E.2d 131 (SC 2000).

Any property belonging to the tenant which was removed from the premises, is subject to distraint if found, provided such distraint is made within thirty days after removal from the premises. (§ 27-39-270).

f. Tenant May Give Bond

Within five days after distraint, the tenant may free the property distrained by giving a bond payable to the landlord in double the amount claimed in the distress warrant, with sufficient surety approved by the court. (§ 27-39-310).

g. Sale of Distrained Property

If the tenant fails to give bond within five days, then the officer may sell the property at a public auction to the highest bidder for cash. Notice of the time and place of sale must be posted upon the premises and two other public places for at least five days prior to the sale. (§ 27-39-320).

The landlord or any other person may become a purchaser at such sale (§ 27-39-340), but the purchaser of such property takes it subject to any lien for taxes existing against the property. (§ 27-39-330).

If the property distrained brings more than the rent with costs at the sale, the surplus should be paid over to the tenant, and the rent paid to the landlord. (§ 27-39-350).

5. Non-Landlord/Tenant Problems: Summary Ejectment of Trepassers

Section 15-67-610 may be used to remove a person from the premises when there is no landlord/tenant relationship. Examples of when section 15-67-610 could be used would include the following: 1) an ex-lover who will not leave the premises; 2) an adult son or daughter who refuses to leave the parent's home; 3) a girlfriend who owns house and wants to evict boyfriend.

When this code section is used to evict a trespasser, the magistrate does not use an application for ejectment. A Notice to Quit the Premises must be served on the trespasser. Personal service on the defendant is required. If, after the expiration of five (5) days from the personal service of such notice, the trespasser does not leave the premises, then the magistrate shall issue a warrant of ejectment to any sheriff or constable to eject the trespasser "using such force as may be necessary."

O.
Liens and Incumbrances

1. Generally

There exists in the law of South Carolina numerous statutory liens; liens on real property, mechanics' liens, liens on ships and vessels, laborers' liens, mining liens, agricultural liens, and still others found in S.C. Code Ann. § 29-1-10 et seq.

Only a few of these liens are within magisterial jurisdiction and of concern to judges in the magistrates' courts. But before going into further detail, magistrates should understand what a lien is and which are within their jurisdiction.

A lien is generally defined as a security, charge, claim, or incumbrance against some specific property. The statutes beginning at § 29-1-10 relate to mortgages, which are liens which may be imposed upon real and personal property. A security interest, sometimes referred to as a lien, is an incumbrance specially created by Article 9 of the Uniform Commercial Code.

2. Jurisdiction

As stated before, the Code provides for mortgages, liens and other encumbrances in § 29-1-10 et seq. A reading of the statutes in their entirety reveals that some of the liens are specifically stated to be within the magistrates' jurisdiction, while in others no reference to jurisdiction is made. It is reasonable to assume that magistrates only have jurisdiction over those liens in which magisterial jurisdiction is specifically bestowed. The following is a list of liens and encumbrances over which magistrates have jurisdiction:

Mechanics' liens §§ 29-5-10 through 29-5-430
Agricultural liens § 29-13-10
Repair or Storage liens § 29-15-10
Certain Animal Owner's liens § 29-15-50

Besides real property mortgages and liens, there are about eight other types of liens which are beyond the jurisdiction of magistrates. Only those specific types of liens listed above are within the jurisdiction of magistrates and only as limited by the statutes themselves. The amount of jurisdiction in each lien situation may be found by referring to the specific sections in the following discussions. In any of these lien situations, if the parties disagree as to the amount of the lien, the magistrate may determine the amount in dispute if it does not exceed $7,500.00. If the amount in dispute could be greater than $7,500.00, the circuit court must determine the amount of the lien, and, if appropriate, the magistrate may sell the property pursuant to the lien.

3. Mechanics' Liens

a. Generally

Magistrates have jurisdiction over mechanics' liens when the amount claimed is not in excess of $100 (§ 29-5-130).

Mechanics' liens are defined as a charge on land, given by statute to the persons named therein, to secure a priority or preference of payment for the performance of labor or supply of materials to buildings or other improvements to be enforced against the

particular property in which they have been incorporated.

There were at one time two types of mechanics' liens as distinguished by statute - one type in which the mechanic (or laborer) and the owner (or through an authorized agent) dealt with each other directly (§ 29-5-10), and another type in which the mechanic (or laborer) and a general contractor, with consent of the owner, dealt with each other (§ 29-5-20). Over the years, the importance of the distinction has been forgotten. (See Hodge v. First Federal Savings, 267 S.C. 270, 277 S.E.2d (1976)).

Mechanics' liens may be founded on a debt due for labor performed or furnished or for materials furnished in the erection, alteration, or repair of any building or structure on real estate (§ 29-5-10). Mechanics' liens may also be had for "improvements on real estate" (§ 29-5-20), "pre-construction expenses" such as grading, bull-dozing, leveling, asphalt paving, construction of ditches, drains, and sewers (§ 29-5-10), and the services of on site security guards (§§ 29-5-10 and 29-5-25). Once again, the difference between lien coverage in §§ 29-5-10 and 29-5-20 is pretty much indistinguishable.

Under § 29-5-10, the mechanic who contracted directly with the owner, or his agent has a lien in the amount of the debt owed to him under the contract, and the owner is liable to him for the total amount. Under § 29-5-20, however, the mechanic who contracted with someone other than the owner has a lien on the amount of funds remaining undisbursed to the contractor at the time notice is provided by certificate of lien (§ 29-5-40). It's easy to see that the preferable lien is § 29-5-10, as the owner's liability is not limited by any payments or disbursements he may have already made to a contractor.

b. Enforcement

Mechanics' liens are created at the moment the labor is performed or the material furnished, and continues until perfection by notice and filing. If a mechanic fails to give notice and file within 90 days, the mechanic's right to a lien dissolves. If notice and filing are accomplished, the mechanic must bring a legal action within 6 months to foreclose the lien or suffer dissolution of his lien. The steps for perfection and enforcement are as follows:

> 1) Written notice to owner of the furnishing of such materials and the amount thereof; this notice only applies to § 29-5-20 type of liens (see § 29-5-40). (This requirement may be satisfied by No. 2).
>
> 2) Serve upon owner or upon person in possession of real estate if owner cannot be located, a certificate of lien and file certificate with the office of the Register of Deeds or Clerk of Court in the county in which the real estate is located. Both must be done within 90 days after mechanic ceases labor or furnishing of material. (§ 29-5-90).
>
> 3) Bring suit to foreclose the lien within six months after ceasing labor or furnishing material. (§ 29-5-120).

The certificate of lien as specified in § 29-5-90 is a statement of a just and true account of the amount due him, with all just credits given, together with a description of the property intended to be covered by the lien, sufficiently accurate for identification, with the name of the owner of the property, if known; and the certificate shall be subscribed and sworn to by

the person claiming the lien or by someone in his behalf. At any time after service and filing of certificate, the owner may effect release of property by filing written undertaking. (§ 29-5-110).

c. Initiation of the Lien Enforcement

Within six months of the creation of the lien (which occurs when the labor was performed or material furnished), the mechanic must file a petition to foreclose his lien with the proper magistrate. (§§ 29-5-130 and 29-5-140). The petition should contain a brief statement of the contract on which it is founded and of the amount due thereon, with a description of the premises subject to lien and all other facts and circumstances; and contain a prayer that the premises be sold and the proceeds of the sale applied to the discharge of his demands. (§ 29-5-160).

Upon the filing of the petition, the magistrate should order notice to be given to the owner of the filing of the petition, accompanied by a certified copy of it, and a date for hearing should be set by the order so as to give the owner at least 14 days prior to the date of the hearing. Such notice of hearing should be given to all other creditors with like liens on the same property. (§ 29-5-190). These like liens should be those still vital and not dissolved by the time periods involved.

All parties to the lien and all other creditors with like liens created out of the same construction project whose claims have not been dissolved (for failure to respect the time periods) should come together at the hearing to contest the matters of debt. (§ 29-5-220) The issues at the hearing may be determined by a jury or by a non-jury format, depending upon the wishes of the parties. If a jury is demanded by any party, one should be empaneled and should determine every material question of fact. (§ 29-5-230).

d. Judgment and Satisfaction

Upon a determination of the existence of a lien against the owner, and the amount of the lien, the court may award a judgment up to $100.00, plus additional costs and attorneys' fees not to exceed the amount of the judgement on the lien itself.

Once the lien has been established and the judgment awarded, and upon the owner's failure to satisfy the lien judgment, the court may order a sale of all (§ 29-5-260) or part (§ 29-5-270) of as much of the property as is necessary to satisfy the claims of the creditors. The order of sale should be made to any officer (sheriff or constable) who is otherwise authorized to make judicial sales. (§ 15-39-630). That officer must make a proper notice of sale in conformity with § 29-5-280.

e. Distribution of the Proceeds

The officer, upon the completion of the sale, must follow strict statutory guidelines as to the proper distribution of the proceeds from the sale.

If all claims against the property are ascertained at the time of the ordering of sale, the court may order the officer to pay over and distribute the proceeds to the lien-holder(s). (§ 29-5-290). If several liens existed and were found to be valid at the hearing all should be paid, fully. If the proceeds of sale are insufficient to cover all claims then the proceeds should be distributed pro rata among all like lienholders. (§ 29-5-290). If not, all claims

against the property are ascertained at the time of the ordering of the sale, (as, for instance, if other liens were to be determined in circuit court) the magistrate should order the officer to return the proceeds of the sale to the court for later distribution. (§ 29-5-300).

If after distribution and satisfaction of all claims of the lien-holders any proceeds remain, the remainder should be paid over to the owner of the property, against whom the lien and sale were asserted (§ 29-5-310), and the lien recorded as satisfied in the records of the Register of Deeds or Clerk's Office. (§ 29-5-430).

f. Prevention of Lien Attachment

The owner of property on which labor is being performed or material furnished may protect himself from the imposition of a mechanics' lien by giving notice in writing of his non-responsibility for the payment of such work to the person performing or furnishing such labor or materials. (§ 29-5-80). The mechanic may still obtain a lien as to the value of labor performed or material furnished up to the time of the receipt of such notice, but has no entitlement thereafter.

g. Priorities

"Priority" refers to the superiority of one lien over another such that one must be paid before the other. No priority exists between mechanics' lienholders who have perfected their liens in conformity with § 29-5-90 and whose liens have not been dissolved due to a failure to bring a foreclosure action within the six month period of § 29-5-120.

Mechanics' liens are of no effect against any mortgage on realty which was in existence and duly recorded prior to the date of the contract, on which the lien is based. (§ 29-5-70). This date generally refers to the time of the creation of the lien which is the time the labor was performed or the material furnished.

If realty is under attachment at the time of filing and recording of the certificate of lien (§ 29-5-90), the attaching creditor has some priority over other liens. (§ 29-5-320).

If attaching creditors have inferior interests (inferior meaning claims perfected subsequent to the filing of the certificate of lien, (§ 29-5-90) to a mechanics' lien, all mechanics' liens should be paid fully out of the proceeds first, and then attaching creditors may be paid in the order of their filing. (§§ 29-5-330 and 29-5-340).

In a situation of mechanics' liens with an intervening attachment (§ 29-5-350), the first mechanics' lien should be paid, then the attachment creditors claim, and then the other mechanics' lien out of remaining funds.

4. Agricultural Liens

There are three types of agricultural liens in South Carolina - landlord's lien for rent, laborer's lien for labor, and landlord's lien for advances. Magistrates have jurisdiction over only the last type of agricultural lien, the landlord's lien for advances. (§ 29-13-80). The jurisdiction of magistrates is limited to advances (payment of money or giving of value prior to the exchange of value but with the exception of a return) for agricultural purposes in an amount not to exceed $100.

The lien arises only upon the proper filing and indexing of the lien pursuant to § 29-13-40. The

magistrate, upon proof of the advances and of the indexing of the lien by the landlord (or his agent or attorney) may issue his warrant of seizure (§ 29-13-100) directed to a constable or sheriff of the county which requires him to seize such crops as may render at a public sale an amount sufficient to satisfy the lien of the landlord. (§ 29-13-80).

While the statutes require a hearing on the merits of the lienholder's claim after seizure and only upon the filing of an affidavit of contest by the person to whom the advances were made (§ 29-13-90), constitutional due process developments over the last decade would seem to require that such hearing be held prior to seizure, except where an allegation of actions to defeat a lien are made pursuant to § 29-13-60. Such a hearing should be held in much the same manner and with notice similar to that of the pre-seizure hearing in claim and delivery actions. (§§ 22-3-1350 and 22-3-1360).

5. Repair or Storage Liens

An owner of any storage place or repair shop who stores or repairs any property or who furnishes any material for repairs has a lien on that property in the amount of the bill for storage or repairs. Upon the completion of repairs or the expiration of the Storage Contract and the failure of the owner of the property to claim the goods and satisfy his debt to the lienholder, the lienholder may have such property sold at public sale to the highest bidder upon the giving of written notice of his claims, to the owner and any lienholders with perfected security interests, and the expiration of 30 days. In the case of a storage contract, "[s]torage costs may be charged that have accrued before the notification of the owner and the lienholder, by certified or registered mail, of the location of the article. Notification to the owner and lienholder by the proprietor, owner, or operator of the towing company, storage facility, garage, or repair shop must occur within five days, after receiving the owner's and lienholders' identities. If the notice is not mailed within this period, storage costs after the five day period must not be charged until the notice is mailed. See § 29-15-10.

After proof of such written notice and the expiration of 30 days, the magistrate must insure the notification of recorded lienholders and advertise the property for fifteen days by posting three public notices of sale. The property may then be sold by the magistrate and the proceeds distributed accordingly. Any remainder of the sale proceeds must be held by the magistrate for the owner of the vehicle or entitled lienholder for ninety days. The magistrate must notify the owner and all lienholders by certified or registered mail, return receipt requested, that the article owner or lienholder has ninety days to claim the proceeds from the sale of the article. If the article proceeds are not collected within ninety days from the days after the notice to the owner and all lienholders is mailed, then the article proceeds must be deposited in the general fund of the county or municipality.

Before the article is sold, the proprietor, owner, or operator of any towing company, storage facility, garage, or repair shop, or any person who repairs or who furnishes material for repair to the article must apply to the appropriate titling facility, including, but not limited to, the Department of Motor Vehicles, or the Department of Natural Resources for the name and address of any owner or lienholder. For non-titled articles, where the owner's name is known, a search must be conducted through the Secretary of State's Office to determine any lienholders. If the article has an out-of-state registration, an application must be made to the state's appropriate titling facility. When the article is not titled in this State, and does not have a registration from another state, the proprietor, owner, or operator of any towing company, storage facility, garage, or repair shop, or any person who repairs or who furnishes material for repairs to the article, may apply to the Sheriff or Chief of Police where the article is stored to determine the state where the article is registered. The Sheriff or Chief of Police must supply, at no cost to the party, the name of the state in which the article is titled.

At public sale, a party petitioning the court pursuant to this statute must place a minimum bid of $1.00

on the article being sold. If no higher bid is offered, the article must be awarded to that party at no cost.

The $7,500.00 jurisdiction limit applies to public sales ordered by the magistrate so the magistrate has jurisdiction to determine the amount of the lien (if disputed) and to order a sale only if the lien does not exceed $7,500.00. (Rock Hill Body Co. v. Rainey, et al, 294 S.C. 426, 365 S.E.2d 228 (1987). If the amount of the lien exceeds $7,500.00 and is in dispute, then the amount must be determined by the circuit court in its original jurisdiction. Once determined by the circuit court, the property may be sold by the magistrate as provided by Section 29-15-10. Under § 29-15-10, magistrates sale abandoned vehicles, red tagged vehicles, and all towed vehicles.

6. Animal Owners' Liens

The owner of any stock horse, jack, bull, boar, or ram which kept by him and offered for the purpose of breeding (or stud) to one having a mare or cow or other stock shall have a prior lien on the issue of that stock where his claim is supported by an oral or written contract. His lien is in the amount of the contractual agreement and is dissolved if the lienholder fails to initiate a suit to enforce his lien within twelve months from the time such claim accrued. Section 29-15-50.

7. Uniform Commercial Code

a. Generally

Article 9 of the UCC, with a few minor exceptions, covers all commercial transactions that involve the giving of a security interest in personal property. Its enactment has repealed by implication a number of statutory provisions, including those relating to chattel mortgages and factor's liens on merchandise. Article 9 provides a single set of rules covering the law of chattel financing, i.e. conditional sales of personal property.

The purpose of the following discussion is limited to a review of some of the more common priority conflicts that may be encountered by the magistrate. It is certainly not to be considered as an outline of Article 9 of the UCC. With regards to the creation and validity of security interests, perfection, rights of third parties, priority conflicts not discussed herein, filing, and default reference should be made directly to Article 9 itself, i.e. Sections 36-9-101 through 36-9-709; and other pertinent sections of the UCC which are found under other articles, particularly Article 1.

b. The Statutory Lien vs. The Security Interest

Section 36-9-102(d)(2) provides that Article 9 does not apply to statutory liens except as provided in § 36-9-333.
Section 36-9-333 provides,

> "(a) In this section, 'possessory lien' means an interest, other than a security interest or an agricultural lien:
>
> (1) which secures payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person's business;
>
> (2) which is created by statute or rule of law in favor of the person;

and

(3) whose effectiveness depends on the person's possession of the goods.

(b) A possessory lien on goods has priority over a security interest in the goods unless the lien is created by a statute that expressly provides otherwise."

The statutory lien for repairs or storage, created by § 29-15-10 is silent with regards to priority. Therefore, this statutory lien takes priority over a perfected security interest.

EXAMPLE

Let's suppose "Mr. X" receives a loan from "Bank Y" and as collateral "Mr. X" gives "Bank Y" (the secured party) a security interest in his automobile. Assuming the security agreement is valid and "Bank Y" properly records it on the title, "Bank Y" now has a perfected security interest in "Mr. X's" automobile. Subsequently, "Mr. X's" automobile breaks down and is taken to"A-1 Auto Repairs". "A-1" repairs the car. "Mr. X", without paying, moves to Guatemala. "A-1" wants to sell the car to satisfy the debt. What is the resolution?

"A-1" has a statutory lien for repairs created by § 29-15-10. "Bank Y" has a perfected security interest created by the security agreement and recording the lien on the title. According to the language of § 36-9-333, "A-1's" statutory lien is superior unless § 29-15-10 expressly provides otherwise. Section 29-15-10 does not provide otherwise; therefore, "A-1" has a superior interest with respect to the repair charges. If "A-1" complies with all the requirements of § 29-15-10, particularly the notice to the owner and any party with perfected security interest, "A-1" may have the car sold by the magistrate and satisfy the repair charge from the proceeds of that sale.

c. The Security Interest vs. The Subsequent Purchaser

Subsections (1) and (2) of § 36-9-307 provide,

"(1) A buyer in ordinary course of business (subsection (9) of Section 36-1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.
"(2) In the case of consumer goods, a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes unless prior to the purchase the secured party has filed a financing statement covering such goods."

EXAMPLE #1

In Kimbrell Furniture Company v. Friedman, 261 S.C. 172, 198 S.E.2d 803 (1973), Mr. O'Neal entered into conditional sales contracts with Kimbrell Furniture Company for the purchase of a TV set and a tape player. In each instance, Kimbrell retained a purchase money security interest in the items sold. It was found that the items were "consumer

goods" within the meaning of § 36-9-109(23) and therefore, pursuant to § 36-9-302(1), Kimbrell had a perfected purchase money security interest in the items even though no financing statement was filed with the clerk of court.

Mr. O'Neal, on the same day of each purchase, pledged the items to Mr. Friedman, d/b/a Bonded Loan (a pawnbroker), as security for loans. Bonded Loan retained possession of the TV and tape player and argued its interest takes priority over Kimbrell's security interest because it (Bonded Loan) is a "buyer in the ordinary course" within the meaning of § 36-9-320(a).

Section 36-1-201(9) provides, in part, that,

> "'Buyer in ordinary course of business' means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker."

Justice Lewis, writing the opinion for the unanimous court, held that Mr. Friedman could not be a "buyer in ordinary course of business" since Mr. O'Neal was not a person in the business of selling TV's or tape players. Therefore, Kimbrell's unfiled purchase money security interest in consumer goods took priority over the pawnbroker's lien.

EXAMPLE #2

Let's suppose Mr. O'Neal, instead of pawning the TV and tape player, sold these consumer goods to his neighbor, Mr. Smith. According to § 36-9-320(b), Mr. Smith takes free of Kimbrell's unfiled purchase money security interest if he takes without knowledge of the security interest, for value, and for his own personal, family, or household purposes. If Kimbrell filed a financing statement prior to Mr. O'Neal's selling of the consumer goods to Mr. Smith, Mr. Smith would have constructive knowledge of Kimbrell's security interest and therefore would only take subject to Kimbrell's lien.

EXAMPLE #3

Let's suppose "Big Furniture Company" receives a loan from "Bank Y" so it may purchase several TV sets. "Bank Y" retains as collateral a purchase money security interest in the TV sets. "Bank Y" perfects its security interest by filing a financing statement in the office of the Register of Deeds or clerk of court and in the office of the Secretary of State. (§ 36-9-501). "Big Furniture Company" sells a few of these TV sets to "Little Furniture Company" and one to Mr. Smith, a consumer. Thereafter "Big Furniture Company" defaults, and "Bank Y" seeks to recover all the TV sets, including those sold to "Little Furniture Company" and Mr. Smith. What is the resolution?

Here, in contrast to example #1, both "Little Furniture Company" and Mr. Smith would take free of "Bank Y's" security interest under the authority of § 36-9-320(a). "Little Furniture Company" and Mr. Smith are "buyers in ordinary course of business" since they bought from "Big Furniture Company", a "person" in the business of selling TV sets.

8. Criminal Penalties

There are two laws which provide for criminal penalties in the sale of property under lien. The first statute, § 29-1-30, provides that "any person who shall willfully 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" is guilty of a misdemeanor. Magistrates have trial jurisdiction over this offense of sale without notice of lien to the purchaser only where the property is valued at less than $50.

Section 36-9-410, which provides in part that "any person who intentionally or willfully sells or disposes of personal property that is subject to a perfected security interest, with intent to defraud the secured party, without the written consent of the secured party" is guilty of a misdemeanor if the value of the property is $1,000 or less and guilty of a felony if the value of the property is over $1,000. The seller may avoid imposition of the penalty by paying the debt secured by the security interest within ten days after sale or disposal, or he may deposit that amount with the Clerk of Court for the county in which the secured party resides within ten day.

This section does not apply when the sale or disposition is made without knowledge or notice of the security interest by the person selling the property or if the loan secured by the property includes a charge for non-filing insurance. Also, this section does not apply to personal property titled by the Department of Public Safety (now Department of Motor Vehicles) or the Law Enforcement Division of the South Carolina Department of Natural Resources.

P.
Protection From Domestic Abuse Act

1. Protection From Domestic Abuse Act

S.C. Code Ann. § 20-4-10 et seq. creates a civil cause of action known as a "Petition for an Order of Protection" to protect household members from domestic abuse. Those statutes allow a household member to seek a restraining order against another household member. Household member means spouses, former spouses, persons who have a child in common, or a male and female who are cohabiting or have formerly cohabited. § 20-4-20 (b).

While the Family Court has jurisdiction over these matters, the petition shall be filed with a magistrate during nonbusiness hours, or at other times when the Family Court is not in session. Magistrates should issue an order of protection whenever the family court in his/her county is not in session. A person requesting an order of protection should not be required to go into an adjoining county's family court to petition for an order of protection.

Actions for an order of protection must be filed in the county in which: (1) the alleged act of abuse occurred; (2) the petitioner resides or is sheltered, unless the petitioner is a nonresident of this State; (3) the respondent resides, unless the respondent is a nonresident of this State; or (4) the parties last resided together. § 20-4-65 prohibits the charging of a filing fee to a person seeking an order of protection from domestic abuse.

The magistrate may issue an order of protection "temporarily enjoining the respondent [the person allegedly causing the abuse] from abusing, threatening to abuse, or molesting the petitioner [the person allegedly suffering the abuse] or the person or persons on whose behalf the petition was filed." (§ 20-4-60[a][1]). Since the magistrate will be contacted about the filing of a Petition only when the Family Court is not in session, or during non-business hours, his role in holding hearings and issuing orders may be limited to emergency orders only. The magistrate may hold an emergency hearing (within 24 hours after service of the petition upon the Respondent) upon Petitioner's showing of good cause, by affidavit, that immediate and present danger of bodily injury exists.

If the magistrate finds good cause for an emergency hearing, he must set a date and time for the hearing, forward the Petition to the proper officials for service of process, and hold a hearing within 24 hours of the time of service of the Summons and Petition upon the Respondent. Under no circumstances may an order of protection be issued without first having given the Respondent notice of the hearing and an opportunity to be heard at that hearing. Forms for the petitions, affidavits, motions and orders will be furnished the Clerks of Court and the Magistrates by Court Administration.

The magistrate will transmit to the clerk of court the Petition and any Orders issued pursuant to the Protection from Domestic Abuse Act. A certified copy of an order of protection must be mailed to or served upon the petitioner, the respondent, and local law enforcement agencies having jurisdiction in the area where the petitioner resides. No charge may be made to the petitioner for this notice. § 20-4-80. The Court shall provide two certified copies of the order, free of charge, to a party receiving a protection order related to domestic or family violence in South Carolina. One of these copies must be for the party's records. The party must be directed by the court to present the other copy to law enforcement in the County in which the order was issued for entry into the National Crime Information Center and for enforcement, if necessary.

Orders of protection issued by family court or magistrates shall include the following bolded, capitalized language:

VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE PUNISHABLE BY NOT MORE THAN THIRTY DAYS IN JAIL AND A FINE OF NOT MORE THAN FIVE HUNDRED DOLLARS OR MAY CONSTITUTE CONTEMPT OF COURT PUNISHABLE BY UP TO ONE YEAR IN JAIL AND/OR A FINE NOT TO EXCEED FIFTEEN HUNDRED DOLLARS AND/OR THREE HUNDRED HOURS OF COMMUNITY SERVICE. The criminal violation of an order of protection is a summary court level offense, which can be heard by all summary court judges. Even though only magistrates can issue orders of protection, all summary court judges can preside over the case if someone is charged criminally with violating the order. The statute governing the criminal violation of an order of protection is § 16-25-20 (E).

Q.
Harassment and Stalking

Any person may seek a restraining order against an individual who is engaged in harassment or stalking. S.C. Code Ann. § 16-3-1750(A) vests magistrates with jurisdiction over an action seeking a restraining order. A restraining order may be issued: 1) with prior notice of a hearing to the defendant and 2) without notice to the defendant in an emergency situation.

1. Issuance of Order With Notice of Hearing

a. Insure that the party is filing in the proper county. § 16-3-1750(B) provides that an action for a restraining order must be filed in the county in which (1) the defendant resides when the action commences; (2) the harassment in the first or second degree or stalking occurred; or (3) the plaintiff resides if the defendant is a non-resident of the State or cannot be found.

b. Effective January 1, 2006, § 16-3-1750(D) prohibits the court for charging a fee for filing a complaint and motion for a restraining order against a person engaged in harassment or stalking. However, the court shall assess a filing fee against the non-prevailing party in an action for a restraining order. The court may hold the person in contempt for failure to pay this filing fee (currently $80.00).

c. The party must complete a complaint and motion for restraining Order. § 16-3-1750(C). The complaint and motion, along with a summons, must be served upon the defendant at least five days before a hearing on the matter. Service must be made personally or by certified mail, return receipt requested. The hearing must be held within fifteen days of the filing of the complaint and motion but not sooner than five days after service has been perfected upon the defendant. § 16-3-1760(C) and (D).

d. At the hearing, the plaintiff must prove by a preponderance of the evidence that the defendant has been engaged in harassment or stalking. The magistrate should complete a restraining order, and indicate in the appropriate spot on the order whether the plaintiff has met the required burden of proof.

e. The possible terms of a restraining order issued pursuant to this Act are found at § 16-3-1770(B). That statute provides that the court may enjoin the defendant from (1) abusing, threatening to abuse, or molesting the plaintiff or members of the plaintiff's family; (2) entering or attempting to enter the plaintiff's place of residence, employment, education, or other location; and (3) communicating or attempting to communicate with the plaintiff in a way that would violate the provisions of the harassment and stalking laws. If the court determines that the order should be issued, the judge should simply check the terms that apply.

f. A restraining order issued to pursuant to these statutes remains in effect for a fixed period of time of not less than one year, as determined by the court on a case by case basis. The order may be extended by the court upon notice to the defendant and good cause shown by the plaintiff at a hearing. The defendant is entitled to a hearing on the extension of an order within thirty days of the date upon which the order will expire. Otherwise, the order dissolves upon the expiration of its term. If the defendant is charged with harassment or stalking prior to the expiration of the order, it remains in effect until the conclusion of the trial. § 16-3-1780. A restraining order issued pursuant to this Act is

enforceable statewide.

g. A certified copy of the order must be served on the defendant. A copy must be provided to the plaintiff and to the local law enforcement agencies that have jurisdiction over the plaintiff. Service must be made without charge to the plaintiff. § 16-3-1790. Any violation of an order is a criminal offense punishable by 30 days in jail, a $500 fine, or both. § 16-3-1770(C).

h. Forms have been developed for use with these actions. SCCA-620, Complaint and Motion for a Restraining Order, SCCA-621, Summons, and SCCA-622, Restraining Order, may all be found in the "Forms Section."

2. Issuance of Order Without Notice

a. Insure that the party is filing in the proper county. § 16-3-1750(B) provides that an action for a restraining order must be filed in the county in which (1) the defendant resides when the action commences; (2) the harassment in the first or second degree or stalking occurred; or (3) the plaintiff resides if the defendant is a non-resident of the State or cannot be found.

b. § 16-3-1750(D) prohibits the court for charging a fee for filing a complaint and motion for a restraining order against a person engaged in harassment or stalking. However, the court shall assess a filing fee against the non-prevailing party in an action for a restraining order. The court may hold the person in contempt for failure to pay this filing fee (currently $80.00).

c. The plaintiff has the right to request an emergency hearing and, for good cause shown, the court must hold a hearing on the motion without notice to the defendant within twenty-four hours of the filing of the motion. Such a request is made by plaintiff's filing of a motion and affidavit for emergency hearing. A prima facie showing of present danger of bodily injury constitutes good cause. § 16-3-1760(A).

d. At the emergency hearing, the plaintiff must prove the allegations contained in the complaint by a preponderance of the evidence. If the plaintiff meets this burden, the court should complete a temporary restraining order. The terms of a temporary restraining order are the same as those found in § 16-3-1770(b) that apply to a permanent order. This order is temporary in nature and remains in effect only until a rule to show cause hearing is held to determine why the order should not be extended to not less than one year with notice of the hearing being given to the defendant.

e. A copy of the temporary restraining order, a copy of the complaint, and rule to show cause must be immediately served on the defendant. Service must be accomplished personally or by certified mail, return receipt requested. The rule to show cause hearing must be held within five (5) days of service on the defendant. § 16-3-1760(B).

f. Forms have been developed for use with these actions. SCCA-620, Complaint and Motion for a Restraining Order, SCCA-622, Restraining Order, SCCA-623, Motion and Affidavit for Emergency Hearing, SCCA-624, Temporary Restraining Order, and SCCA-625, Rule to Show Cause may all be found in the "Forms Section."

R.
Interpleader Actions

1. Interpleader Actions

§ 22-3-10 (13) vests the magistrate courts with jurisdiction to entertain interpleader actions arising from real estate contracts for the recovery of earnest money, only if the sum claimed does not exceed $7,500.00. Generally, interpleader is an equitable remedy in which a person, who owes or is in possession of money or property in which he disclaims any title or interest but which is claimed by two or more persons, prays that the claimants be compelled to state their several claims, so that the court may adjudge to whom the matter or thing in controversy belongs.

§ 22-3-25 is narrowly drawn so that the only interpleader actions available in magistrates court arise when a real estate broker or agent is unable to determine whether the broker or seller is entitled to the return of earnest money, so the broker or agent asks the court to accept the money, dismiss him from the case, and allow the buyer and seller to plead their case to the court.

When an interpleader action is requested, the following directions shall apply. The forms referenced below may be found in the Rules section of this book.

1. Broker or agent, as plaintiff completes the Complaint for Interpleader (SCCA 670) and files the filing fee prescribed by § 22-3-25 ($45.00 plus proviso fee of $25.00 equals $90.00, which includes service on two defendants). Complaint should be filed in county where earnest money is present and, if possible, where at least one defendant resides. If both defendants are non-residents of this State, service must be effectuated by certified mail. Be sure real estate contract is attached.

2. Serve defendant/buyer and defendant/seller with a copy of the Complaint, along with the Interpleader Summons (SCCA 671). You may wish to provide the defendant with a blank copy of Answer to Complaint in Interpleader (SCCA 672) at this time so they may complete the form and return it to the court within thirty (30) days (sixty days if service was by mail).

3. Upon receipt of answers by the court, the judge shall review to determine if interpleader should be ordered. If neither the defendant/buyer nor the defendant/seller have a claim against the plaintiff/broker (agent), the court should accept the earnest money or require the plaintiff to hold the money until further ordered from the court. If there are no further claims against the plaintiff, the court may dismiss the plaintiff as a party to the action. However, the plaintiff may be needed for testimony. Complete Order for Interpleader and Summons for Hearing (SCCA 673). The order and summons should be mailed to the defendant/buyer and defendant/seller. If defendant/buyer or defendant/seller has a claim against plaintiff, all three parties should be summoned to determine the issues.

4. Hold hearing to determine which claimant should receive earnest money. Proof is by the preponderance of the evidence. Both parties should be given an opportunity to present their case. Since this is a matter in equity, parties do not have a right to a jury trial. If requested, costs may be imposed against the losing party. Upon determination, court should issue an order granting relief as is appropriate.