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Security Transactions

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SECURITY TRANSACTIONS

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Lease — Mortgage

In *Crown Central Petroleum Corp. v. Port Oil Co.*,[1] a Fourth Circuit Court of Appeals case arising from the Eastern District of South Carolina, one of the questions at issue was whether a lease and lease-back arrangement between the plaintiff, a supplier of petroleum products, and the defendant, a distributor, was in the nature of a mortgage. The facts are exceedingly complex. Briefly, however, the salient circumstances in this connection were that the defendant leased certain filling station sites to the plaintiff, and the plaintiff leased back the sites to the defendant. The purpose was to enable the defendant to secure credit to erect buildings on the sites, the loans obtained by the defendant to be secured by the rents from the plaintiff. There were other agreements under which the defendant agreed to fill its requirements exclusively by purchases from the plaintiff, with a specification of minimum purchases. In the event of breach by the defendant of the provisions of the distributorship agreements the plaintiff was to have the right to cancel the lease-backs and repossess the sites.

This action was brought by the plaintiff to recover possession of the sites on the ground that the defendant had repudiated its agreement. The District Court held for the defendant on the ground that there had been violation by the plaintiff of its part of the agreement and of another related agreement, and — more relevant here — that the lease and lease-back arrangement, and the other agreements, constituted a mortgage or mortgages of the stations, which would be discharged upon payment by the defendant of the construction loans, and that such payment or its tender — which the defendant was willing and able to make — gave the defendant the right to retake the stations and entitled it to a cancellation of the leases and lease-backs.

The Court of Appeals reversed. On the mortgage feature it declared that the arrangement did not constitute a mortgage.

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1. 301 F. 2d 175 (1961).

The court pointed out that the defendant owed nothing in money to the plaintiff except the lease-back rent, and the plaintiff was not endorser of the defendant's loans, nor had it assumed any responsibility for the defendant which would create a right of indemnity for which security might have been afforded. The only mortgage or pledge relationship, the court observed, was between the defendant and the banks from which it had borrowed — the security being the rents assigned.

The other aspects of reversal and questions for determination on remand need not be noted here, since they are not essentially related to the security element of the case.

Suretyship — Construction

In the period under survey two cases were decided dealing with the scope and coverage of contractors' bonds. In one of them there is the additional question of the effect of the principal's bankruptcy and discharge upon the surety's liability.

In *S. C. Supply & Equipment Co. v. James Stewart & Co.*,[2] the action was against a contractor and his surety. The defendant contractor was not the original contractor but had taken over the work by consent of all the parties. The bond was a standard American Institute of American Architects labor and material bond, under which there was the obligation to "promptly make payment to all claimants as hereinafter defined, for all labor and material used or reasonably required in the performance of the contract." A claimant was defined as:

> . . . one having a direct contract with the principal or with a sub-contractor of the principal for labor, material, or both, used or reasonably required for use in the performance of the contract, labor and material being construed to include that part of water, gas, power, light heat, oil, gasoline, telephone service or rental of equipment directly applicable to the contract.

The plaintiff had leased scaffolding equipment for use on the project to the original contractor. The equipment was used by the substituted contractor — the named defendant — but not all of it was returned to the plaintiff. This action was

2. 238 S. C. 106, 119 S. E. 2d 106 (1961).

brought against the named defendant and the surety for unpaid rent and for damages for conversion arising out of the failure to return all the scaffolding.

The lower court held against both defendants for unpaid rent and for damages for conversion. The Supreme Court affirmed as to the named defendant (whose defense was that he was acting only as agent for the original contractor) but reversed as to the surety as to damages for the failure to return equipment. Concerning rent unpaid, the Court held that it was specifically covered by the terms of the bond. As to the scaffolding, the Court held that the case was governed by the principles stated in *Kline v. McMeekin Constr. Co.*,[3] which draws the distinction between:

> . . . labor and materials consumed in the work or in connection therewith and those made use of in furnishing the so-called contractor's plant and available not only for the particular contract but for other work. Tools, machinery and appliances used by the contractor, although worn out in the progress of the work, are not such labor and materials as are ordinarily contemplated by contractor's bonds.

The Court held that the scaffolding was a part of "tools, machinery and appliances used by the contractor," and was an item in his plant. The fact that the item was leased, rather than purchased, made it no less a part of his plant — nor did the fact that it was leased only to be used on the particular project make a difference.

The case of *Dominion Culvert & Metal Corp. v. United States F. & G. Co.*[4] was concerned with the scope of the bond and with the effect on the surety's liability of the discharge in bankruptcy of a sub-contractor. The action was brought against the surety by an unpaid supplier of materials furnished to a sub-contractor who had worked on a public construction contract. The facts, briefly, were that after the sub-contractor had gone into bankruptcy, the prime contractor paid to the trustee in bankruptcy the balance due the sub-contractor and received a release from the obligee of the bond and the trustee in bankruptcy. The plaintiff filed its claim in bankruptcy as a common creditor and received a pro rata dividend. It thereafter brought this action to recover

3. 220 S. C. 281, 67 S. E. 2d 304 (1951).
4. 238 S. C. 452, 120 S. E. 2d 518 (1961).

the balance. It was non-suited. On appeal the lower court was reversed.

The Supreme Court disposed preliminarily of the question whether the plaintiff was within the scope of the bond as to persons protected. The bond undertook that the contractor would pay all persons furnishing labor and materials, and also that "all persons who have furnished labor and material shall have a direct action on the bond." In this aspect the Court held that materials furnished the sub-contractor came within the purview of the bond, stating:

> It is now settled by the decisions of this court that a contractor and the surety on his bond, given to secure payment for labor and materials furnished in the construction of a public improvement, whether the bond be required by statute or not, are liable not only for labor and materials furnished to the contractor, but also for those furnished to a sub-contractor [citing cases] . . . and that a materialman may bring a direct action against the surety on such bond [citing cases].

The privilege of direct action is strengthened, it is to be noted, by the bond provision that the right shall exist in favor of those persons.

Turning to the effect of the bankruptcy, the Court held that the insolvency of the sub-contractor did not affect the surety's liability, and that it was a risk which the prime contractor and the surety assumed, and as to which they could have protected themselves by the procurement of bond or other security from the sub-contractor. The Court also held that the fact that the contractor had paid the full amount owing the sub-contractor and had obtained a release from both the trustee in bankruptcy and the obligee did not work a discharge of the contractor or the surety, the Court adopting what it regarded as the majority rule, which is based "upon the obligations assumed by the contractor and his surety, under their contracts with the owner, to those furnishing labor and materials for the construction." Further, the Court held, the filing of a claim by the plaintiff with the trustee in bankruptcy and receipt of a dividend did not relieve the surety, the conclusion being based largely on 11 U. S. C. A. § 34: "The liability of a person who is a co-debtor with, or guarantor, or in any manner a surety for the bankrupt shall not be altered by the discharge of such bankrupt."

The Court points out that discharge of the bankrupt is personal to him and, particularly in view of the Bankruptcy Act (the section quoted), does not relieve the surety. This result is not altered by the filing of claim and participation in the bankrupt's estate, except to the extent of reducing liability by what has been received.

Motor Vehicle Title Act

In the period under survey three cases were decided in which the applicability of the Motor Vehicle Title Registration Act,[5] originally enacted in 1957,[6] was brought into question or mention. A close analysis of the provisions of the Act is not necessary or feasible here. The facts in each of the cases are relatively simple.

In the first of the cases, *Clanton's Auction Sales, Inc. v. Harvin*,[7] the plaintiff, an automobile wholesaler owning two Volkswagen automobiles acquired by it from a dealer in Pennsylvania, with accompanying Pennsylvania certificates of title, delivered the two cars to the named defendant, who was a dealer. This was in February, 1960. The defendant was to pay for them by check to be sent the next day, the plaintiff retaining the Pennsylvania certificates and all other indicia of title, intending to keep them until paid by the purchaser. The defendant mortgaged one of the cars — the one involved in this action — to Stephenson Finance Company, which shortly afterwards recorded its mortgage. The defendant did not pay the plaintiff, and a few days after the transaction he was committed to a mental institution. The action was brought by the plaintiff to recover possession of the car. Stephenson Finance Company claimed the right to possession as a subsequent bona fide encumbrancer for value without notice, alleging that the plaintiff had attempted a reservation of title which did not comply with the Bailment Statute,[8] which requires that reservations of title by a seller be reduced to writing and recorded in the manner provided by law for the recording of chattel mortgages. It further pleaded waiver and estoppel. The lower court, to which the case had been submitted by consent for trial without a

5. CODE OF LAWS OF SOUTH CAROLINA, §§ 46-139—46-139.61 (1952).
6. Act No. 402, 50 Stat. 595 (1957).
7. 238 S. C. 352, 120 S. E. 2d 237 (1961).
8. CODE OF LAWS OF SOUTH CAROLINA § 57-308 (1952). For a late amendment to the Statute, see under Legislation hereafter.

jury on an agreed statement of facts, held for Stephenson, without referring to the Title Act. The grounds for so holding were that the Bailment Statute was applicable to the facts of the case, and that, in addition, the plaintiff by delivering the car to a known dealer in automobiles was estopped to assert its claim against the mortgagee of the dealer.

The Supreme Court affirmed for substantially the same reasons as those given by the lower court. The Court stated the plaintiff's position to be that by retaining indicia of ownership, all other persons, including the finance company, were placed on notice that the party in possession of the car might not have title. To this the Court answered:

> It must be remembered that all parties were aware of the other's business, that both Clanton's Auto Auction Sales, Inc. and Harvin were known automobile dealers engaged in the sale and financing of cars, and that this was known to Stephenson Finance Company. Plaintiff knew or should have known that Harvin, being a dealer, would in the normal course of business either finance or sell. Ordinarily one in possession of personal property is presumed to be the owner and one purchasing such property is required to use only reasonable diligence to ascertain if there are any defects in the title thereto. *Russell Willis, Inc. v. Page,* 213 S. C. 156, 48 S. E. (2d) 627 [1948].[9]

One can hardly object to the proposition that the Bailment Statute covered the case, since the plaintiff here had reserved an interest which was not reduced to writing and recorded. There may be some dissent, however, from the proposition that in surrendering a car to a known dealer, the person delivering might be assumed to be aware that the other might sell or mortgage it. Even where an agency is created under which the agent is to sell, there is no implication that he has authority to mortgage, and persons deal-

9. In this case, however, the possessor of a car had obtained it from the plaintiff on the fraudulent representation that he was acting as agent for a purchasing principal, giving the plaintiff a check in the asserted principal's name. In the transaction the plaintiff delivered a bill of sale made out in the principal's name. The car was thereafter involved in a wreck and was sold to the defendant, who did not know of the prior circumstances. In the purchase the bill of sale was exhibited to the defendant, by the seller, who represented himself as the person named in the bill of sale. It will be noted that the seller (the counterfeit principal) had more than mere possession of the car; he had some indicia of ownership, although fraudulently obtained.

ing with him, as ostensible owner, are not protected in taking a mortgage.[10] Mere possession, it would seem from the cases, is not enough to give rise to an estoppel. Even, too, if the reservation of interest had been put into writing and recorded, the fact of permitting a purchaser to hold the chattel for trade would carry the implication, whether there was or not an express agreement as well, that the reserver or mortgagee consented to the *sale* of the property free of the lien or reserved interest. This, rather than estoppel, seems to be the true ground for the holdings in those cases[11] protecting purchasers from a dealer, although estoppel is mentioned in the cases. The principles of implied consent and estoppel, leading to the same result, are related, except that estoppel to deny ownership in one apparently having it would extend to both sale and mortgage by him; while consent would seem to be limited to sales.

The plaintiff's exceptions and appeal were directed to the contention that the transaction was covered by the Motor Vehicle Title Act. The Supreme Court took note of the argument, but disposed of it unfavorably by pointing to Section 22 of the Act (§ 46-139.81, South Carolina Code, 1952, Supp.), which provides that the act "does not apply to or affect . . . a security interest created by a manufacturer or dealer who holds the vehicle of sale . . . ." It also directed attention to the fact — and by itself it would seem to be controlling — that at the time of the transaction the Motor Vehicle Title Act provided that security interests perfected under the

10. Evans v. Pendarvis, 124 S. C. 489, 117 S. E. 716 (1923), car delivered to agent to sell, agent represented he was owner and mortgaged to one unaware of facts; holding also that Bailment Statute was inapplicable. The case is based largely on Carmichael v. Buck, 12 Rich. Law 451 (S. C. 1860). Evans v. Pendarvis was followed in Standard Motors Finance Co. v. Sansbury, 152 S. C. 313, 149 S. E. 597 (1929).

11. Cudd v. Rogers, 111 S. C. 507, 98 S. E. 796 (1918); Harper v. Abercrombie, 115 S. C. 360, 105 S. E. 749 (1920), mortgage recorded, estoppel to assert agency which had previously existed; Manufacturers' Finance Co. v. Boyd, 128 S. C. 339, 122 S. E. 496 (1924), in which it is suggested (p. 343) that if subsequent bill of sale by mortgagor of cars had been taken as security, instead of representing purchase, transferee might not be protected; International Agric. Corp. v. Lockhart, 181 S. C. 501, 188 S. E. 243 (1936), in which is recognized the rule that mortgagee authorizing sale in due course of trade impliedly consents to sale free of lien; Atlas Fin. Co. v. Credit Co., 216 S. C. 151, 57 S. E. 2d 65 (1949), in which mortgagee of particular car was held impliedly to have consented to sale free of lien, with protection to mortgagee of purchaser. This last case was cited by the circuit judge as being sufficiently analogous to the present case to control it, but the mortgagee of the purchaser was protected because the purchaser was protected. This is not a case in which, like the present one, the dealer gave the mortgage.

act were also required to be recorded under the terms of the General Recording Act.[12] This provision for additional or continued recordation was repealed in the 1960 legislative session,[13] and an amendment was added to the section which requires perfection of security interests to the effect that "No other recordation shall be necessary to protect the interest of the lienholders."[14] The repeal and amendment came *after* the transaction involved. Accordingly, the failure to record by the plaintiff would protect the subsequent mortgagee. The argument of the plaintiff appears to be that, nonetheless, the failure of the seeming owner to furnish a certificate or other indicia of title put his mortgagee upon notice of his lack of ownership — very much like the inquiry notice charging a subsequent party with notice of ultimate facts despite non-recordation. This contention in substance was rejected by the overall holding penalizing the seller for delivering the car to the purchaser and creating the impression of ownership in him, with an additional observation that there was no evidence of actual or constructive notice as to the mortgage.

The second of the three cases (though last decided), *Clanton Auction Sales, Inc. v. Young,*[15] was a companion case to the first, in that it involved the other of the two cars delivered by Clanton to Harvin. The facts were the same except that here Harvin *sold* the car to Young. The lower court, granting a directed verdict for the plaintiff, held that the Motor Vehicle Title Act laid down a "hard and fast rule" which called for compliance with its terms and that the innocence of the purchaser would not alter the result. Subsequently to this holding the case of *Clanton's Auction Sales, Inc. v. Harvin,* just reviewed, was decided by the Supreme Court. In the appeal in the present case, the Supreme Court reversed the lower court, declaring that its decision was based on the decision in *Harvin,* and the fact that in that case the transaction was a mortgage and in this case a sale was

12. CODE OF LAWS OF SOUTH CAROLINA, § 60-101 (1952). The provision calling for this recordation was in § 25 of the act as passed in 1957, appearing as § 46-139.83 in the Supplement to the 1952 Code. The companion action of the legislature was the omission from the act as proposed of a provision eliminating the necessity for recording. See comment in 10 S.C.L.Q. 125 (1957).
13. Act No. 744, 51 Stat. 1730 (1960).
14. Act No. 744, 51 Stat. 1730 (1960), amending § 23 of Act 402 of 1957, CODE OF LAWS OF SOUTH CAROLINA, § 46-139.82 (1952).
15. 239 S. C. 250, 122 S. E. 2d 640 (1961).

of no consequence.[16] The Court was of the opinion, following the lead of the earlier case, that there was estoppel against the plaintiff. Although the Court might have disposed of the case solely on the ground that recordation, at the time of the transaction, was required, and perhaps, as did the earlier case, hold that the act did not in any event affect the transaction, it undertook to discuss the question whether, in the face of the act, an estoppel may be invoked by one who has purchased without requiring the seller to produce and assign a certificate of title. The Court observed that there was a conflict of authority on the point:

> Some courts take the view that the terms of the statute are mandatory and must be complied with to effect a valid transfer of title. They hold that estoppel may not be invoked to defeat the title of the registered owner, and that any person who purchases a motor vehicle without requiring the seller to exhibit and assign his title is guilty of negligence and is not a *bona fide* purchaser . . . . On the other hand, it is held in a number of jurisdictions that the title registration acts do not preclude application of the general principles of equitable estoppel.

The Court then took the momentous step of accepting the latter view, basing it to a certain extent upon the view that the local act is not as drastic as those, or some of those, acts as against which estoppel is denied. The South Carolina act, the Court points out, "merely provides that a transfer without compliance with its terms 'is not effective' — Section 46-139.52." It added, "We find nothing in it indicating a legislative intent to abrogate the plea of equitable estoppel. It was never contemplated that this statute which was obviously intended to prevent fraudulent transfer of cars should be applied so as to protect one whose conduct has enabled another to commit a fraud."

The respondent was granted permission to criticize and seek modification of certain language in *Harvin,* which it contended was an erroneous characterization of the nature and effect of a title registration certificate. The Court held

16. Of course the case is all the stronger where the dealer sells, as distinguished from his mortgaging. As already seen, a mortgagee, by permitting the mortgagor to engage in trade with the affected chattel, impliedly consents to its sale free of his lien. The possible objections to a mortgage do not hold as to a sale.

that the respondent had misconstrued the language, and that the question had no bearing on the view it took of the case.[17]

The third of the cases, *Ex Parte Dort*,[18] brought in 1959, was very much like the *Harvin* case. The action was brought by Stephenson Finance Company against one Wingard to recover possession of several cars mortgaged to it by Wingard, a used car dealer. Dort intervened, making claim to one of the cars. His claim was based on the fact that he had sold the car to Wingard, who had given a check in payment. Dort's agent in making the sale, had retained the buyer's bill of sale — which had been signed by both seller and buyer — and the certificate of title, intending to keep them until the check was paid. In the meantime Wingard borrowed from Stephenson, giving a mortgage on the car sold by Dort, Stephenson recording shortly afterwards. The check was later returned unpaid. On trial the jury found for Dort, but the trial judge granted a motion for Stephenson *non obstante veredicto*.

The Supreme Court sustained the lower court, principally under the provisions of the Bailment Statute,[19] holding that even if there were a memorandum of sale, it amounted to a reservation of interest which was not effective for want of recording. The appellant contended that the retention of the written evidence of ownership by him put Stephenson on notice of the purchaser's possible lack of title, but the Court concluded that the statute, and the General Recording Act,[20] controlled the case; and that both parties being automobile dealers, Dort must have known that in the normal course of business Wingard "would either sell or finance the automobile."[21] The decision is based largely upon *Russell Willis, Inc. v. Page*,[22] relied upon so heavily in *Harvin*. The conclusion was that, under the circumstances, there was estoppel, and that in applying it, the Court was doing no more than giving recognition to the "two innocent parties"

17. The language which the respondent criticized and sought to modify was a statement that the "indicia of title" retained by the plaintiff in *Harvin* "at most might be termed an unrecorded reservation of title which would not be effective as against subsequent creditors without notice." 238 S. C. 352, 356. Respondent's Brief, p. 19, in which the respondent stated that the language "might be regarded as highly prejudicial to respondent's cause here."

18. 239 S. C. 250, 122 S. C. 2d 640 (1961).

19. CODE OF LAWS OF SOUTH CAROLINA, § 57-308 (1952).

20. CODE OF LAWS OF SOUTH CAROLINA, § 60-101 (1952).

21. As to the financing, see comments in Harvin.

22. 213 S. C. 156, 48 S. E. 2d 627 (1948).

doctrine. In the trial below the judge had held that the Motor Vehicle Title Act did not apply, against the contrary contention by the intervenor. The appellant excepted but abandoned this ground on appeal, and the Court decided the case without considering the act.[23] It is obvious, in any event, that *Harvin*, the earlier case, and *Young*, the later, would be determinative even if the act were considered.

The sweeping generalization in *Russell Willis, Inc. v. Page*, on which these cases depend, that "Ordinarily one in possession of personal property is presumed to be the owner and one purchasing such property is required to use only reasonable diligence to ascertain if there are any defects in the title thereto," while stating perhaps an acceptable principle does not resolve particular cases — since in each case the question remains whether the party dealing with the apparent owner has used reasonable diligence. The purchaser in *Young* — not a dealer or an automobile financer — could hardly be expected to do more than take the word of his seller that he could sell; and it is possible that even if there had been a recording of a reservation of title, the purchaser would have been protected under the theory of implied consent, which has been discussed. In the other two cases, the seller took the affirmative step of withholding the usual papers, but failed to record anything. There was no trust in the purchasing dealer's word alone. The mortgagee in these two cases — coincidentally it was the same Stephenson Finance Company — relied simply on the dealer's word. In each case the dealer was not, it turned out, worthy of trust; yet as between the seller who did not trust by keeping the papers, and the financer which did trust in not demanding to see them, the former was the loser. The writer is not familiar with the practices of finance companies in taking mortgages from dealers, but he ventures the guess that the normal practice is to ask for papers, and it is not the less normal because in individual cases previous experience has been satisfactory and no loss has been caused.

All three of these cases, it has been seen, were based on transactions prior to repeal in 1960 of the requirement for recording. Cases arising from transactions since that time of course are no longer to be considered in that light. The question naturally is presented whether recordation would

23. This case (Dort) is cited and relied on in the Young case.

be necessary to protect a lienholder — including the reserver of ownership — where the person creating the security interest is a dealer. Under § 46-139.81 of the 1952 Code, Supp., noted by the Court in *Harvin,* the requirement for protection of security interests is not applicable to "a security interest on a vehicle created by a manufacturer or dealer who holds the vehicle for sale." Assuming that a dealer who creates the interest at the time of purchase from his seller — so that at the precise time he does not as yet hold the vehicle for sale — is nevertheless included in this description, the security interest so created need not be represented on any certificate of title. The 1960 insertion into § 46-139.82 of the 1952 South Carolina Code, Supp., (at the same time that Section 25 of the 1952 act requiring recordation was repealed) of the provision "No *other* recordation shall be necessary to protect the interest of the lienholders," clearly dispenses with the necessity of recordation where the security interest has been perfected (emphasis added). It would appear that where there has been no perfection of a security interest under the act because none has been required, as in the case of a dealer, the general requirements of recording have not been dispensed with; so that a dealer's creation of a security interest would continue to be governed by the recording acts — the Bailment Statute or the General Recording Act. Indeed, it might be argued that even before the 1960 legislation, the result would have been the same even if Section 25 had not been enacted as part of the original act — that is, at least as far as mortgages or similar security interests created by dealers were concerned.

LEGISLATION

Bailment Statute

The Bailment Statute[24] was amended by the 1962 General Assembly[25] by the addition of the following sentence between the first and second (last) sentences of the statute:

> In the case of a subsequent mortgage for value of the property for valuable consideration without notice, the instrument evidencing such subsequent mortgage must be filed for record in order for the holder to claim under this section as a subsequent mortgagee for value

24. CODE OF LAWS OF SOUTH CAROLINA, § 57-308 (1952).
25. Act No. 867, 52 Stat. 2158 (1962).

without notice and the priority shall be determined by the time of filing for record.

The obvious purpose of the amendment is to make the Bailment Statute consistent in its operation with the General Recording Act[26] as a "notice-race" type of statute. The General Recording Act was amended in 1958[27] to bring it into the "notice-race" category — that is, that the subsequent party, who has qualified otherwise as a bona fide purchaser or encumbrancer for value without notice, must, in order to obtain priority, record before the recordation of the instrument against which he would be protected. No similar qualification was then provided by legislation for the Bailment Statute, which is essentially a recording act;[28] and the present legislation was designed to require, harmoniously, the same procedure for protection of the subsequent party in situations falling under the Bailment Statute as under the larger act.[28a] In one respect, however, there is a material difference;

26. CODE OF LAWS OF SOUTH CAROLINA, § 60-101 (1952).

27. Act No. 939, 50 Stat. 1958 (1958).

28. If consistency is to be thoroughly achieved, other recording acts perhaps should be similarly amended. For example, the statutes dealing with recordation of assignments of mortgages — CODE OF LAWS OF SOUTH CAROLINA, §§ 60-103 *et seq* (1952); the statute covering mortgages for future advances — CODE OF LAWS OF SOUTH CAROLINA, §45-55 (1952). There are others.

28a. There is one unusual aspect to both amendments — to the General Recording Act and the Bailment Statute. Although it is stated in the text that priority is accorded to the subsequent party only if he first *records*, the exact langauge in the amendment to Recording Act is ". . . the instrument evidencing such subsequent conveyance or subsequent lien *must be filed for record* (italics supplied) in order for its holder to claim under this section as a subsequent creditor or purchaser for value without notice, and the priority shall be determined by the time of *filing for record* (italics supplied)."; and the exact language in the amendment to the Bailment Statute is ". . . the instrument evidencing such subsequent mortgage *must be filed for record* (italics supplied) in order for the holder to claim under this section as a subsequent mortgagee for value without notice and the priority shall be determined by the time of *filing for record* (italics supplied)." This would seem to give priority to later party if he first *filed for record*, rather than having had the paper recorded. Filing is not the same as recording in order to constitute constructive notice. Bamberg v. Harrison, 89 S. C. 454, 71 S. E. 1086 (1911). Cf. Sternberger v. McSween, 14 S. C. 35 (1880). Only when the paper is indexed is there such notice. CODE OF LAWS OF SOUTH CAROLINA, § 60-156 (1952). Whether the distinction between *filing for record* and *recording* was in the legislative mind, and whether if so there was deliberate discrimination between the two in the amendments is a matter of conjecture. Recording, rather than filing, would seem to be necessary as to subsequent parties, and there may arise the interesting case of a purchaser or encumbrancer who *filed* before the prior party had recorded but whose paper was not entered on the indexes until after a still later party had become a purchaser or encumbrancer and had actually recorded first. Leaving aside the complication of the still later third party in the case just posed, what is the "race" in the "notice-race" description of the statute? Is it a race between recording by the

the General Recording Act's amendment requires prior recording by a subsequent *purchaser of real estate,* as well as by subsequent lien holders of real and personal property; the amendment to the Bailment Statute makes no mention of purchasers of affected chattels. The reason is that purchasers of chattels under absolute or unconditional bills of sale are not required to record these instruments for their protection.[29] In this respect the amendment to the Bailment Statute accords with the similar omission from the amendment to the General Recording Act of any requirement that purchasers of chattels record first in order to obtain precedence over prior undisclosed parties — an implicit recognition of the lack of duty on such purchasers to record in the first instance.

The amendment to the General Recording Act refers broadly to "subsequent lien creditors" — which would embrace mortgagees, judgment creditors and other lienors. Although the Bailment Statute affords protection to both lien creditors and simple contract creditors, the amendment to the statute places the requirement for prior recording upon subsequent mortgagees only. Apparently the status of creditors other than mortgagees is unaffected by the amendment.[30]

Installment Loans — Real Estate Mortgages

Section 8-233 of the 1952 Code of Laws of South Carolina, which dealt with certain installment loans, was amended[31] in the 1962 session of the General Assembly. The unamended statute permitted banks and other lending agencies to make installment loans of not less than $10 or more than $1,000 over a period of not less than six months, with a permissible interest charge of not more than seven per cent on the whole of the original principal — in the language of the statute,

prior party and recording by the subsequent party; or a race between recording by the prior party and filing by the subsequent party; or a race between filing by the prior party and filing by the subsequent party?

29. Mather-James Co. v. Wilson, 172 S. C. 387, 174 S. E. 265 (1933); G.M.A.C. v. Anderson, 172 S. C. 395, 173 S. E. 268 (1933). The same is all the more true in the multitudinous cases where the sale takes place without a writing; there is nothing to record.

30. In some of these cases there is nothing to be recorded. See Nesbitt v. Whitlock, 113 S. C. 519, 101 S. E. 822 (1919), lien for repairs; Tucker v. Hudgens, 132 S. C. 374, 129 S. E. 77 (1925), pledge. Even a creditor who had reduced his claim to judgment might not be a lien creditor, since, in order to obtain a lien on personal property, he must levy under his judgment. CODE OF LAWS OF SOUTH CAROLINA, § 10-1711 (1952).

31. Act No. 762, 52 Stat. 1882 (1962).

"just as if the entire amount of the debt matured on the date the last installment becomes due." No reference was made to any security for such a loan. The 1962 amendment changes the statute by permitting installment loans of not less than $10 or more than $7500, over a period of not less than three months "and on all such loans [banks, etc.] are allowed to make interest or add-on charges at the rate of not exceeding seven per cent, per annum just as if the entire amount of the debt had matured on the date the last installment becomes due." Thus, in addition to a removal of limitation of time, the change is that the allowable amount on which interest may be charged on the original, rather than the reduced, principal is increased from $1000 to $7500. The amendment, however, carries this important proviso: "*provided,* that the provisions of this section shall not apply to loans secured by mortgages on real estate." There is no mention of the consequences of attempting to secure such loans by real estate mortgage, and it is not clear whether such a mortgage securing an installment loan under the section would be a nullity, or whether the giving of the mortgage would produce usury in the obligation with a corresponding taint in, but not invalidity of, the mortgage.