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# Security Transactions

Coleman Karesh
*University of South Carolina*

# SECURITY TRANSACTIONS

COLEMAN KARESH*

## *Foreclosure of Chattel Mortgage—Venue*

The differences procedurally in a chattel mortgagee's remedies are pointed up sharply in *Caye & Co. v. Saul*,[1] which involved the question of venue. The plaintiff, holder of a conditional sales contract on machinery, was given possession of the machinery by the defaulting buyer. It thereafter brought an action of foreclosure in Richland County, where it did business, against the buyer or mortgagor, who resided in Edgefield County. The defendant sought a change of venue to Edgefield County and was unsuccessful, the lower court holding that the action was one "for the recovery of personal property distrained for any cause" and therefore triable under Section 10-301 of the 1952 Code which requires trial in the county "in which the subject of the action or some part thereof is situated." The holding was reversed by the Supreme Court, which took the view that an action to foreclose a chattel mortgage is not one for the recovery of personal property and hence falls under Section 10-303 of the 1952 Code which provides that "in all other cases the action shall be tried in the county in which the defendant resides at the time of the commencement of the action."

The Supreme Court, calling attention to the equitable nature of a foreclosure *action*,[2] declared that "the purpose of a foreclosure proceeding is to fully determine the entire controversy between the parties, to protect the rights of all parties, to determine the amount of the debt in order to disburse the proceeds of sale, and should the personal property so sold be not sufficient to pay the debt, that a deficiency judgment may be entered against the maker of the obligation." A foreclosure action thus encompasses all the essential in-

*Professor of Law, University of South Carolina.

1. 229 S. C. 306, 92 S. E. 2d 696 (1956).
2. The taking of possession by a chattel mortgagee, or an action in claim and delivery for possession, is "at least a step in the process of foreclosing his mortgage." Stokes v. Ins. Co., 130 S. C. 520, 531, 126 S. E. 649 (1924). Ordinarily when possession is obtained in either of these ways, the mortgagee proceeds to foreclose his mortgage *by exercise of power of sale*, instead of by action, as was sought to be done in this case. Johnson v. Vernon, 1 Bailey Law 527 (S. C. 1830).

gredients looking to the total adjudication and enforcement of the rights of the parties, but it may have, as here, unintended consequences differing from those in the usual taking of possession by the mortgagee and sale by him thereafter. Not the least of these, aside from venue, is the essentially and exclusively equitable character of the action,[3] in this respect not different from an action to foreclose a mortgage of real estate.[4]

*Absolute Deed as Mortgage*

The rather common situation in which a grantor contends his deed was intended as security appears again in *Howard v. Steen*,[5] where the outcome on final appeal was adverse to the claim. The grantors had been in the habit of borrowing money from the grantee and made the deed in suit, after which they remained on the land and sharecropped it. The master held the deed to have been intended as an outright transfer, but the lower court reversed, to be reversed in turn by the Supreme Court, which remarked, among other things, that it was influenced by the fact that the master "had the advantage of seeing the witnesses, observing their demeanor and better evaluating their testimony." As always, these cases rest upon the facts, as to which men may differ. The Supreme Court's conclusion in essence was that the presumption that a deed is what it purports to be had not been overcome, and that the high degree of proof required to convert a deed into a mortgage had not been supplied. The usual factors in cases of this kind were considered and analyzed, among them the fact that the grantees *sharecropped* the land (in itself not any more important than in the great run of cases where the grantor-mortgagor remains on the land as tenant or otherwise), the payment by the grantee of taxes on the land, a lack of evidence showing disproportion between the value of the land and the expressed consideration.

The grantors also attacked the deed on the ground of fraud

3. The action of foreclosure is not one for the recovery of money only, entitling one to a jury trial as a matter of right. General Plywood Corpn. v. Richard Jones, Inc. 216 S. C. 322, 57 S. E. 2d 636 (1950); Judson Mills v. Norris, 166 S. C. 425, 164 S. E. 919 (1932). Nor does the interposition of a counter-claim convert the action into a legal one. Gibbes Machinery Co. v. Hamilton, 89 S. C. 438, 71 S. E. 1029 (1911); Speizmann v. Guill, 202 S. C. 498, 25 S. E. 2d 731 (1943).

4. Carolina Housing and Mortgage Corp. v. Orange Hill A. M. E. Church, 230 S. C. 498, 97 S. E. 2d 28 (1957), hereafter reviewed, and cases there cited.

5. 230 S. C. 531, 95 S. E. 2d 613 (1956).

in that allegedly they had been induced to believe that the paper they had signed was a mortgage instead of a deed. The contention was found not to be borne out by the facts. The ground of attack here is of course quite different from that of attempting to show that a deed absolute on its face was intended as a mortgage: the former is pitched on fraud going to the identity of the instrument, the latter directed to its intended operation and not requiring a showing of fraud, duress, mistake or the like.[5a]

*Mortgage in Possession—Accounting*

In *Watson v. Little*,[6] a tenant in exclusive possession who held a pair of mortgages on the interests of some of her cotenants was allowed to set off against her liability for occupancy to them the amount of the mortgage debt. The action was for partition, and the defendant in sole possession who had unsuccessfully claimed an exclusive title[7] asserted that she had the right of a mortgagee in possession and should be permitted as such to demand the amount of the mortgage debt as an offset, even though the mortgages could not be foreclosed because of lapse of time. To the objection that the assertion of the mortgage claim was barred by laches, the Supreme Court, affirming the decree below, held, under the authority of *Anderson v. Purvis*[8] and *Ham v. Flowers*,[9] that the defendant was entitled to payment of her mortgage debt by way of offset despite the lapse of time—under the broad doctrine that "he who seeks equity must do equity".

The method of accounting by a mortgagee in possession as

5a. For a discussion of the distinction, see White v. Livingston, ... S. C. ..., 98 S. E. 2d 534 (1957), a case decided after the survey period, holding that in action to set aside deed on ground of fraud in representing it to be a mortgage, party not entitled to have review on theory deed was intended as a mortgage.

6. 229 S. C. 486, 93 S. E. 2d 645 (1956).

7. Watson v. Little, 224 S. C. 359, 79 S. E. 2d 384 (1953).

8. 211 S. C. 255, 44 S. E. 2d 611 (1947). In this action to foreclose a mortgage, the defendant interposed as an offset debts owed by the mortgagee to the mortgagor, the debts being barred by the Statute of Limitations. Although the debts could not be made the basis for affirmative relief, nor sued upon at law, the Court held that the maxim "he who seeks equity must do equity" would operate to compel the offset as a condition of plaintiff's recovery.

9. 214 S. C. 212, 51 S. E. 2d 753, 7 A. L. R. 2d 1124 (1949). Even more to the point is Knight v. Hilton, 224 S. C. 452, 79 S. E. 2d 871 (1954), where a mortgagee in possession was allowed to retain possession until the mortgage debt was paid, although an action to foreclose the mortgage or to sue on the debt had been barred by the Statute of Limitations.

laid down in the earlier cases of *Ham v. Flowers*[10] and *Knight v. Hilton*[11] was approved and held to govern in this case.

One of the points of controversy in the accounting was the method of calculation of interest on the mortgage debt. The formula of the lower court was approved as in accordance with the rule laid down in the early case of *Wright v. Wright*[12]: "The rule for calculating interest, where partial payments have been made, is to apply the payment in the first place to the interest due, and the surplus to the principal. Subsequent interest is to be calculated on the balance of principal remaining due. If payment be less than the interest, the surplus of interest is not to be added to the principal."

*Assignment*

Two real estate mortgage cases deal with, and are disposed of by, principles which are not primarily grounded in mortgage law but in the rules of assignment, which in turn may be related to other considerations touching the merits of the case. Broadly, the questions go to (1) the availability as a defense against the assignee of the mortgage, of a defense against the assignor and (2) the existence of any such defense.

In *Clanton v. Clanton*,[13] the wife in a divorce action sought as related relief the cancellation of a mortgage which she had given to a bank and which thereafter had been assigned to a corporation whose capital stock was owned almost entirely by her husband. The facts are lengthy and complex and need not be detailed here, but substantially the findings below and on appeal were as follows: The wife had executed a mortgage to the bank, securing a note given by the husband and endorsed by her. No consideration moved to the wife and she was in fact an accommodation party in a transaction designed to build up a reserve fund in aid of the operation of her husband's business — the proceeds of the note going into a reserve account and to be controlled by the bank "as security against losses that might occur through the handling of a larger volume of checks in behalf of" the husband in his automobile business. The wife also gave a separate guaranty agreement. At a later time the husband drew a check for the entire amount of the reserve account in favor of the

10. Note 9, *supra*.
11. Note 9, *supra*.
12. 2 McCord Equity 185 (S. C. 1827).
13. 229 S. C. 356, 92 S. E. 2d 878 (1956).

bank, but it kept the note and mortgage for a year or more and then assigned them to a corporation of which the husband was the president and majority (98%) stockholder. It was held that the purpose for which the note and mortgage had been given had been fulfilled, and that in fact the loan represented by the endorsed note had been paid. These defenses, available against the mortgagee, were available against the assignee as well, since the latter could not, under the facts, qualify as a holder in due course, no value having been given for the assignment and there being knowledge of the facts and a lack of good faith. Accordingly the wife was held entitled to cancellation of the note and mortgage.

In *Carolina Housing and Mortgage Corporation v. Reynolds*[14] an action to foreclose a mortgage terminated below and on appeal in a money judgment only. The plaintiff, purchaser of the mortgage and negotiable note secured by it, sued for personal judgment and foreclosure and was met by a defense of failure of consideration, in that the mortgagee, a contractor, had not made repairs and improvements as he had agreed. The plaintiff had paid value before maturity for the paper, but the defendant contended that the plaintiff had notice of the failure of consideration and could not qualify as a holder in due course. The contention was, under the facts and law, unavailing, the holding both below and on appeal being that the assignee was such a holder, in that it did not "have actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith" — necessary, under the N. I. L. (Section 8-886 of the 1952 Code) to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating it.

There are other aspects of the case relating to the attributes of commercial paper which are treated elsewhere in this survey. In essence the case on appeal was not a mortgage case because the lower court denied foreclosure of the mortgage and gave only a money judgment on the note, and no appeal on the foreclosure issue was made. The refusal of foreclosure, though not appealed from, presents an interesting feature, and it is thought necessary here to call attention to it because the Supreme Court's reference may create an unwarranted implication. In the recital of facts in the opinion

14. 230 S. C. 491, 96 S. E. 2d 485 (1957).

it is stated "However, the mortgage was held by the lower court to be invalid because of an incompetent witness and there was no appeal." No comment was added and perhaps none was necessary in view of the failure to appeal, but there is the possibility of assumption derived from this statement that a mortgage attested by an incompetent witness cannot be enforced by an assignee. The lower court decree, set out in the record (f. 209), points out that one of the witnesses was the mortgagee himself and that the mortgage was on that account invalid, since two witnesses are required; that it was good only as between the parties, and that while the assignment of the note carried the security (and here there was even more, the assignment in terms being of both) — "the plaintiff, while a holder in due course as to the note, took the mortgage with knowledge that it was improperly witnessed and therefore invalid in the hands of any one except the original mortgagee. The plaintiff thus had actual knowledge of the infirmity of the mortgage, since by merely looking at it he would have seen that, to all intents and purposes, it had only one witness." No authority is cited for this proposition, which virtually has it that an equitable mortgage, of which this is a type, is non-assignable. Defectively executed mortgages, otherwise conforming to the Statute of Frauds, are enforceable in equity as equitable mortgages,[15] and the expression that they are "good between the parties" is not reasonably to be taken as restricting them to the parties personally. Such defective mortgages may not be en-

15. Harper v. Barsh, 10 Richardson Equity 149 (S. C. 1858), unsealed real estate mortgage; Pledger v. Ellerbe, 6 Richardson Law 266 (S. C. 1853), one witness; Farmers Bank & Trust Co. v. Fudge, 113 S. C. 25, 100 S. E. 628 (1919), incompetent witness; Arthur v. Screven, 39 S. C. 77, 17 S. E. 640 (1892), unsealed mortgage; Bryce v. Massey, 35 S. C. 127, 14 S. E. 768 (1891), unsealed mortgage with only one witness; Ewbank v. Ewbank, 64 S. C. 434, 42 S. E. 194 (1902), unsealed mortgage; Stelts v. Martin, 90 S. C. 14, 72 S. E. 550 (1911), mortgage with only one witness. The same principle is applicable to defective mortgages of personal property.

If the reasoning that a mortgage void at law is valid nonetheless but only as between the parties, mortgages of after-acquired property and of expectancies would likewise be ineffective in the hands of assignees. And if the reasoning is applicable to every type of equitable mortgage, assignability would be denied, and effectiveness kept from such liens in the cases of gratuitous transfers and transfers with notice, and of equitable liens there are many in addition to defectively executed mortgages: Agreements to give a mortgage, imperfect attempts to presently appropriate property as security, failure to use words of alienation in chattel mortgages, mortgages on after-acquired property and expectancies, absolute transfers intended as security, and others. See 59 C. J. S., Mortgages § 13 *et seq.* (1949) as to types of equitable mortgages.

titled to record and therefore, even if placed on record, may not constitute constructive notice to third parties,[16] but that is as far as the cases seem to go. It would be no more logical to deny rights to an assignee[17] of an equitable mortgage than to protect a transferee with notice, or a gratuitous transferee, from an equitable mortgage given by the transferor.[18] In the nature of things there is no reason why from considerations of logic, principle or policy an equitable mortgage arising out of a defectively executed legal mortgage should not be as fully assignable as a legal mortgage, particularly when it is remembered that the debt carries the security and an equitable mortgage is security.

Another case of mortgage assignment involves more precisely the procedural problem of joinder of parties — here, the assignor. In *Carolina Housing and Mortgage Corporation v. Orange Hill A. M. E. Church*,[19] the assignee of a negotiable note and mortgage who was suing to foreclose was met with a defense by the church, in whose name the papers appeared to have been given, that the note and mortgage had been signed by unauthorized persons and also that they had been obtained by the fraud of the mortgagee, who had assigned them on the date of their execution to the plaintiff. The plaintiff then moved for leave to amend its complaint by making the mortgagee-assignor a party and to amend its prayer by asking, alternatively to foreclosure, for judgment against the assignor if the church's defense of fraud or forgery[19a] should be sustained. The motion was granted over the objection of the church and thereafter plaintiff amended its complaint, making the assignor a party and seeking relief over against

16. Harper v. Barsh, note 15, *supra*; Arthur v. Screven, note 15, *supra*.

17. In Harper v. Barsh, note 15, *supra*, the record of an unsealed mortgage was held not to be constructive notice, but the mortgage was held by an assignee, and the Court said nothing about any inability on the part of an assignee to enforce such a mortgage. In Farmers Bank v. Fudge, note 15, *supra*, the mortgage, attested by a possibly incompetent witness, was sued on by an assignee, and the Court, while using the expression "good between the parties", held for the assignee. This case was among those cited in the decree.

18. See Young v. Young, 27 S. C. 201, 206, 3 S. E. 202, 205 (1887); 59 C. J. S., Mortgages § 13 (1949).

19. 230 S. C. 498, 97 S. E. 2d 28 (1957).

19a. The characterization of the papers as a forgery was made by the plaintiff and not by the church. It is doubtful in any event that the papers were 'forged' since it is the general rule, even where there is an intent to defraud, that 'generally an instrument which shows on its face that the person who did so signed as an agent is not a forgery.' 23 AM. JUR., Forgery § 10 (1939). See, also, 37 C. J. S., Forgery § 8 (1943).

him. The assignor demurred to the amended complaint and moved to have himself stricken as a party defendant, but the lower court refused both, and appeal by the assignor followed. After observing that a foreclosure action is an equitable one, the Supreme Court held that the trial judge acted correctly in making the assignor a party, under the broad provisions of Sections 10-203, 10-204 and 10-219 of the 1952 Code relating to the making and bringing in of parties. The court treated the matter as one essentially within the discretion of the trial judge, and held that it had been properly exercised. Among other things which prompted this conclusion were the rights which the plaintiff might have against the assignor on his endorsement — if the endorsement was general, then as a party severally liable on the obligation and capable of being sued with the maker in the same action under Section 10-206 of the 1952 Code;[19b] and if qualified, on the implied warranties arising out of the endorsement, under Section 8-896, a part of the N. I. L. In summary, the Supreme Court upheld the lower court's decree because "by joining him [assignor] a complete decree can be had between the parties, thereby preventing future litigations and removing the necessity of a multiplicity of suits, and that there may be a final determination of the rights of all the parties interested in the subject matter of the controversy here involved."

On the whole decision of the Court seems sound for the reasons last quoted, but it would seem that in every case in which an obligor being sued on an assigned obligation set up the defense of fraud or some other defense against the assignor — particularly the former — there would be no room for the exercise of a discretion that would deny the sought-for bringing in of the assignor as a party, since in every such case the desirable results mentioned would be reached if he were made a party, and failure to bring him in

19b. It does not appear in the record, as the opinion points out, whether the endorsement of the assignor was general or qualified. In the amended complaint the plaintiff did not ask for judgment against the endorser on the note, but on the possible breach of implied warranty. It would have been proper to join the endorser as a party liable on the secured obligation, under Section 45-86 of the 1952 Code, which reads in part " . . . and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the Court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other persons and may enforce judgment as in other cases."

would defeat them. The matter of making an assignor a party, either originally or by later joinder, is not a new one. It is clear that as a rule he is not a *necessary* party, either as plaintiff or defendant[20] (excluding the cases of partial assignment and collateral assignment). Where he has been made a party, it is not error to retain him as a party, even though no affirmative relief could be given against him.[21] And where an assignor guarantees the payment of the assigned mortgage obligation, he may be made a party, not because he is an assignor, but because he is a guarantor and so amenable to joinder under Section 45-86 of the 1952 Code.[22] More nearly in line with the factual situation in the case under review is *Bennett v. Hindman*,[23] where in an action by an assignee to foreclose a mortgage the mortgagor sought to have the mortgagee-assignor made a party on the ground of commission of fraud by the assignor in the procurement of the mortgage. The mortgagor was unsuccessful, the Court on appeal holding that the matter of joinder rested in the discretion of the trial judge; and to the mortgagor's argument that if the mortgage were held void in the proceeding the plaintiff might call upon the mortgagee to take up the note and mortgage and the mortgagee, taking a reassignment, might thereupon subject the mortgagor to a second suit, the Court's reply was that the position was unsound in that the assignor was in privity with the assignee and bound by any adjudication against the latter.[24] *Bennett v. Hindman* was heavily relied on by counsel for the resisting assignor in the case under review and as vigorously denied

20. Smythe v. Brown, 25 S. C. 89 (1885); McDaniel v. Austin, 32 S. C. 601, 11 S. E. 350 (1889); 37 AM. JUR., Mortgages § 300 (1941).

21. Peoples Bank v. Bryan, 148 S. C. 133, 145 S. E. 692 (1928).

22. Welborn v. Cobb, 92 S. C. 384, 75 S. E. 691 (1912), construing Section 188 of the 1902 Code, now Section 45-86 of the 1952 Code. See note 19a.

23. 176 S. C. 151, 171 S. E. 794 (1935).

24. How an assignor can be in such privity with his assignee as to be bound by an adjudication against the assignee, thereby permitting the assignee to sue the assignor on the implied warranty without an opportunity to the latter to defend, is a proposition that is hard to accept. To find the assignor guilty of a fraud in an action in which he is not a party, and to make such a finding completely effective against him thereafter, is certainly to deprive a person of his day in court. See Tunkle v. Padgett, 160 S. C. 274, 158 S. E. 693 (1931), in which a mortgagor being sued by an assignee was denied the right to set up fraud by the assignor, because the assignor was not a party — the syllabus reading accurately "Issue whether mortgagee procured bond and mortgage by fraud could not be adjudicated in suit between mortgagee's assignee and mortgagor to which mortgagee was not party." This case is not cited in Bennett v. Hindman, nor is it cited in any cases thereafter.

as being applicable by opposing counsel, but the Court does not mention it in its opinion. If the matter is dependent upon discretion, then reconciliation can nearly always be had between the cases, but it seems odd in any event that given two cases involving foreclosure of an assigned mortgage in which there is a defense of fraud perpetrated by the assignor, and where on that account the implied warranty on assignment must inevitably come into play then or thereafter, discretion in the one case takes the form of denying joinder of the assignor and in the other resolves itself into permitting it.[25]

*Obligation Secured by Mortgage*

In *Theodore v. Mozie*,[26] which was an action by an administrator of a decedent to sell real estate in aid of assets, the question arose as to the validity of a mortgage given by the wife of the decedent who had inherited an interest in the land from her. The execution of the mortgage was admitted by the heirs and the administrator but they denied its validity on the ground that there was no consideration for the mortgage. The fact found by the master, and affirmed by the lower court, was that the mortgage had been given by the wife as security for a loan made to her husband, and that under established contract principles the loss or detriment to the promisee (mortgagee) in lending the money was sufficient as consideration and that the consideration need not have moved or have been beneficial to the promisor. The obligation being valid the mortgage was likewise so and subject to enforcement.

In upholding the mortgage — the only serious controversy being upon the facts — the Court in the frame of mortgage law is simply acknowledging that a mortgage may be given to secure the debt of a third person.[27]

25. The only point of factual dissimilarity in Bennett v. Hindman and the case reviewed is that in the former the defendant mortgagor sought to have the assignor made a party, and in the latter the plaintiff assignee sought the joinder. It is not perceived that the difference is of any consequence.

26. 230 S. C. 216, 95 S. E. 2d 173 (1956).

27. See Clanton v. Clanton, note 13, *supra*, discussed hereinbefore in this survey, as an instance. See, also, Greer Bank & Trust Co. v. Waldrep, 155 S. C. 47, 151 S. E. 920 (1930), cited by the Court. There is no difficulty in sustaining a mortgage to secure a debt of a third person then or thereafter incurred, of which Theodore v. Mozie is an example, any more than there is to sustain from the point of view of consideration an endorsement, guaranty or suretyship undertaking. There is, however, some difference of opinion with respect to the validity

In *Johnston v. Farmers & Merchants Bank*[28] a question of consideration arose also. The action was brought by the maker of a renewal note, last of a series, to cancel the note and mortgage securing it, for an accounting and other relief, on the ground that nothing was due at the time of the giving of the note, in that the debt to be represented by the renewal note had already been paid by the application of collateral. The lower court refused to permit testimony showing these alleged facts on the grounds that it would vary the terms of the contract and thereupon gave judgment against the maker and ordered foreclosure. This was held to be error. The holder of the note was the original payee, and under Section 8-845 of the 1952 Code (N. I. L.) "absence or failure of consideration is a matter of defense as against a person not a holder in due course."

### *Payment*

In *Twitty v. Harrison*,[29] the outcome of an action to foreclose a real estate mortgage turned on the question of payment and as such was resolved on issues of fact and principles of agency. The pivotal question was whether payments made by the mortgagor were made to one who was in fact the agent of the owner of the mortgage. The court below found actual agency to receive payment, and this the Supreme Court sustained, holding that with such agency established it was immaterial that the mortgagor did not demand the production of the mortgage papers on making final payment to the agent or that the mortgagor did not obtain and record a satisfaction

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of a mortgage given to secure the antecedent debt of another, where no new consideration, such as extension of time, is given. Although the guaranty or endorsement of an existing debt without more lacks consideration and is invalid under the rule that "past consideration is no consideration"—Henderson v. Skinner, 146 S. C. 281, 143 S. E. 875 (1928); Lowndes v. McCabe Fertilizer Co., 157 S. C. 371, 154 S. E. 641 (1930); Alexander v. Martin, 182 S. C. 399, 189 S. E. 468 (1936)—a mortgage to secure such a debt, as distinguished from a promise as security, is generally treated as valid. On the whole that seems to be the South Carolina view, though no particular discussion is had of the point. Greer Bank & Trust Co. v. Waldrep, *ante*. See, also, Koster v. Welch, 57 S. C. 95, 35 S. E. 435 (1899); Pierson v. Green, 69 S. C. 559, 48 S. E. 624 (1904); Lawrence v. Hicks, 132 S. C. 370, 128 S. E. 720 (1925). None of these cases is clear-cut and each could be explained on other grounds. See OSBORNE, MORTGAGES § 107 (1951), favoring the view that a mortgage to secure the pre-existing debt of a third person is valid, on the broad ground that a mortgage is an executed transaction. There is of course no question as to the validity of a mortgage given to secure the mortgagor's antecedent debt. Fairey v. Hayne, 111 S. C. 132, 96 S. E. 694 (1918).

28. 229 S. C. 603, 93 S. E. 2d 916 (1956).

29. 230 S. C. 174, 94 S. E. 2d 879 (1956).

of the mortgage. The burden resting on the debtor to show payment and to show the authority of the person to whom payment was made to receive it was held to have been met. As a consequence the action to foreclose failed.

## LEGISLATION

The principal legislation of the 1957 General Assembly affecting security transactions is the sweeping Motor Vehicle Certificate of Title and Anti-Theft Act.[30] The substance and purpose of the act are undoubtedly known to the bar. It is too lengthy and extensive in scope to be given analysis in a survey and must be left to later and different treatment. Suffice it to say, the rights of holders of "security interests"[31] on motor vehicles and the rights of transferees of vehicles subject to such interests are prescribed and regulated in detail. In a very considerable sense, the act is a registration or recording statute (Sections 23 and 24). Of major importance is Section 25: "Security interest subject to this act are also required to be recorded as provided for in Section 60-101 of the Code of Laws of South Carolina, 1952,[32] in order to be valid against creditors of the owner or subsequent transferees or lienholders of the vehicle." Since, as noted, the act by its nature is also a recording act, it is not readily apparent why this requirement is inserted or what useful or legitimate purpose is served by it. In the Uniform Act, adopted by the National Conference of Commissioners on Uniform State Laws in 1955, which has not been presented as yet to the General Assembly, recognition of the lack of need for continuation of existing recording practices is embodied in its Section 25: "The method provided in this act of perfecting and giving notice of security interests subject to this act is exclusive. Security interests subject to this act are hereby exempted from the provisions of law which would otherwise require or relate to the [recording] [filing] of instruments creating or evidencing security interests." Of course the Uniform Act is not the law but the quoted provision represents the considered judgment of those who have dealt closely with acts

30. No. 402, approved by the Governor July 1, 1957.
31. Defined in Section 1(cc) as an "interest in a vehicle reserved or created by agreement and which secures payment or performance of an obligation, conditional sale contract, conditional lease, chattel mortgage or other lien or encumbrance (except taxes or attachment liens provided for in Section 45-551, Code of Laws of South Carolina 1952)".
32. This is the general recording act, affecting both chattels and real estate.

similar to and seeking the same goal as the South Carolina act. Moreover, the act presented to the General Assembly for consideration and so introduced was the Model Act and its Section 25 is identical with the Section 25 of the Uniform Act. What is now Section 25, subjecting security interests to the additional requirement of recording, was accepted as a substitute for the proposed Section 25. The present version is the antithesis of the model and uniform acts in this respect, and it is regrettable, to say the least, that Section 25 as adopted is repugnant in letter and spirit to the objectives of the title law as it is generally accepted.

Aside from the objection that the requirement for recording is unneeded, there is the great probability of complications arising from it. Will recording constitute constructive notice if the security interest has not been perfected? The reasonable interpretation would probably be that it would not. If the security interest were not recorded, would a subsequent creditor, lienholder or transferee be put on inquiry or actual notice by the appearance of the certificate showing the existence of the interest? Would the requirements for the bona fide purchaser or encumbrancer under the recording acts — as related to value, notice, good faith — remain the same, or would they be altered to fit whatever requirements there are for such parties under the other provisions of the act? Or would the reverse be true — that the creditor, encumbrancer or transferee must qualify under all the sections as a bona fide purchaser as that is interpreted under the recording act? What will the consequences be in any such event: (1) if the requirements are the same, but governed by the recording act; (2) if the requirements are the same, but not governed by the recording act; (3) if the requirements are not the same? There are undoubtedly many other questions that may arise, but it is a conservative prediction that none of those here posed or those that may occur will be easy of solution.