

1983 WL 182012 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

September 29, 1983

*1 Ms. Virginia T. Hafen
Register of Mesne Conveyance
Spartanburg County Courthouse
Spartanburg, South Carolina 29301

Dear Ms. Hafen:

By your letter of August 30, 1983, you have requested an opinion as to whether the Register of Mesne Conveyance office must file and record copies of Petitions of Bankruptcy. Based upon the following discussion, we would advise that if a certified copy of a petition, decree of adjudication or other pertaining to proceedings in the United States Bankruptcy Court should be presented to the Register of Mesne Conveyances or Clerk of Court to be filed, indexed, and recorded, then the Register of Mesne Conveyances or Clerk of Court must accept it to be filed, indexed and recorded.

[Section 30-5-190 of the Code of Laws of South Carolina \(1976\)](#), is the controlling statute in this case:

A certified copy of a petition, with schedules omitted, commencing a proceeding under the Bankruptcy Act¹ of the United States, of the decree of adjudication in such proceeding or of the order approving the bond of the trustees appointed in such proceeding may be filed, indexed and recorded in the office of the register of mesne conveyances or clerk of court in those counties in which the office of register of mesne conveyances has been abolished in the same manner as deeds. The register of mesne conveyances or the clerk of court in those counties in which the office of register of mesne conveyances has been abolished shall file, index under the name of the bankrupt and record such certified copies filed for record in the same manner as deeds, for which services he shall be entitled to the same fees as are provided by law for filing, indexing and recording deeds.

(emphasis added.) This statute may be read as requiring the Register of Mesne Conveyances to file, index under the name of the bankrupt, and record such copies filed for record in the same manner as deeds would be indexed and recorded, in those instances when such certified copies may be presented for filing, indexing, and recording. The use of the term 'shall' indicates that such acts are mandatory rather than discretionary. 1A [Sutherland Statutory Construction](#), § 25.04. This is in keeping with the general rule that such recording would be an act ministerial in nature, since the Register of Mesne Conveyances is a ministerial officer whose duties are absolute and prescribed by law. See, [Long v. Seabrook](#), 260 S.C. 562, 197 S.E.2d 659 (1975); [Dunbar v. Fant](#), 170 S.C. 414, 170 S.E. 460 (1933); 66 Am.Jur.2d, [Records and Recording Laws](#), § 195.

You have attached to your letter a copy of a statute cited by an attorney who requested that a copy of the petition be filed. The statute is [11 U.S.C.A. § 549](#), a portion of the Bankruptcy Reform Act of 1978, which reads in part:

(a) Except as provided in subsection (b) and (c) of this section, the trustee may avoid a transfer of the property of the estate—. . .

*2 (c) The trustee may not avoid under subsection (a) of this section a transfer, to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value or to a purchaser at a judicial sale, of real property located other than in the county in which the case is commenced, unless a copy of the petition was filed in the office where conveyances of real property in such county are recorded before such transfer was so far perfected that a bona fide purchaser of such property against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of

such good faith or judicial sale purchaser. A good faith purchaser, without knowledge of the commencement of the case and for less than present fair equivalent value, of real property located other than in the county in which the case is commenced, under a transfer that the trustee may avoid under this section, has a lien on the property transferred to the extent of any present value given, unless a copy of the petition was so filed before such transfer was so perfected.

The purpose of subsection (c) is established by reference to Senate Report No. 95-989, accompanying S.2266, 95th Cong., 2d Sess. (1978):

Subsections (b) and (c) are derived from section 21g of the Bankruptcy Act. They specify that the trustee may file notice of the commencement of the case in land recording offices in order to give notice of the pendency of the case to potential transferees of the debtor's real property. Such filing is unnecessary in the county in which the bankruptcy case is commenced. If notice is properly filed, a subsequent purchaser of the property will not be a bona fide purchaser. Otherwise, a purchaser, including a purchaser at a judicial sale, that has no knowledge of the case, is not prevented from obtaining the status of a bona fide purchaser by the mere commencement of the case.

1978 U.S. Code Cong. & Ad. News (95 Stat.) 5828. When read with [Section 30-5-190 of the South Carolina Code](#), it is apparent that filing notice with the Register of Mesne Conveyances of the commencement of an action in bankruptcy is discretionary on the part of the trustee (or the petitioner or his attorney) and will serve to protect potential transferees of the debtor's real property. Though the trustee or petitioner may have discretion in filing such a petition with the office of Register of Mesne Conveyances, that office would then be mandated by [Section 30-5-190](#) to properly file, index, and record the petition as noted above, once the certified copy of the petition has been properly presented.²

In a telephone conversation, you stated that you had accepted the copy of the petition for bankruptcy for filing and that you had handled the petition in the same manner as a deed would have been handled. According to the statute cited above, this procedure was appropriate and should be followed whenever a certified copy of a petition for bankruptcy is presented for filing.

***3** I trust that the above discussion has answered your inquiry. If further questions arise, please contact this Office.
Sincerely,

Patricia D. Petway
Staff Attorney

Footnotes

¹ The Bankruptcy Act has been superseded by the Bankruptcy Reform Act of 1978, [11 U.S.C.S. § 101](#), *et seq.*

² In counties which do not have a Register of Mesne Conveyances, the same principles would apply to the Office of the Clerk of Court.

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