

1977 WL 37421 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

September 12, 1977

*1 Honorable W. Henry Jackson
Clerk of Court
Drawer 1128
Beaufort, South Carolina 29902

Dear Mr. Jackson:

The Attorney General has referred your letter of August 31, 1977, regarding problems concerning the filing and indexing of deeds, mortgages, judgments, etc. in the Office of the Clerk of Court for Beaufort County, to me for response. In my opinion, the legal difficulties presented by your proposed solution are fairly minimal. Such problems may be discussed as follows:

- (1) The problem of actual or constructive notice sufficient to protect those who file and record against subsequent purchasers.
- (2) The problem of civil liability of the Clerk of Court.

It is first necessary to make a legal distinction between the act of 'filing' and that of 'recording' a legal instrument such as a deed or mortgage for notice purposes. It is the law in South Carolina that a legal instrument is 'filed' with the Clerk of Court's office immediately upon delivery of that instrument for the purpose of filing. [King v. Atlantic Coast Line Railroad Company](#), 86 S.C. 509, 68 S.E. 769 (1910). The act of 'recording', on the other hand, is the copying of the instrument to be recorded in a book kept for that purpose. See 66 Am. Jur.2d 335, 'Records and Recording Laws'.

South Carolina's principal recording statute, codified in Code of Laws of South Carolina, § 30-7-10 (1976) further states that all deeds, mortgages, etc. 'shall be valid so as to affect the rights of subsequent creditors or purchasers only from the day and hour when they are recorded. [Emphasis added]. For priority purposes, however, any priority contest 'shall be determined by time of filing for record.' [Emphasis added; see Means, 'The Recording of Land Titles in South Carolina; A Title Examiner's Guide,' 10 S.C.L.Q. 346, 403; see § 30-7-10 supra].

With respect to the relationship between recordation and indexing, there is adequate case law in South Carolina to support the proposition that once a grantee, mortgagee, etc., has recorded an instrument with the Clerk of Court, he is sufficiently protected against subsequent purchasers, irrespective of the fact that the Clerk of Court either fails to make any entry of such transaction in the indices of such records or simply erroneously indexes the same. [Mitchell v. Cleveland](#), 76 S.C. 432, 57 S.E. 33 (1907); [Armstrong v. Austin](#), 45 S.C. 69, 22 S.E. 763 (1895).

This authority is seemingly jeopardized by a later statute, currently codified in Code of Laws of South Carolina, § 30-9-50 (1976). The statute provides that the Register of Mesne Conveyance, or in lieu thereof, the Clerk of Court: Shall immediately upon the filing for record of any deed, mortgage or other written instrument of the character mentioned in § 30-7-10 supra enter it upon the proper indexes in his office, which shall constitute an integral, necessary and inseparable part of the recordation of such deed, mortgage or other written instrument for any and all purposes whatsoever . . . (Emphasis added)

*2 The statute further mandates that:

The entries in the indexes hereby required to be made shall be notice to all persons sufficient to put them upon inquiry . . . but the recordation of a deed, mortgage or other written instrument shall not be notice as to the purport and effect thereof unless the filing of the instrument for record be entered as required hereby in the indexes. (Emphasis added).

This statute thereby makes 'proper' indexing an 'integral' part of the recordation process; without such indexing, a prior purchaser is presumably not protected.

Moreover, a second statute, amended as late as 1972 and codified in Code of Laws of South Carolina, § 30-9-30 (1976) notes that:

Each clerk of court and register of mesne conveyances in this State shall keep a record in his office in which he shall file all conveyances, mortgages, liens, contracts and papers relating to real and personal property, by entering therein the names of the grantor and grantee, mortgagor and mortgagee, obligor and obligee, date of filing and nature of the instrument immediately upon its lodgement for record. Such filing shall be notice to all persons sufficient to put them upon inquiry of the purport of the instrument so filed and the property affected thereby. (Emphasis added).

Reading these two statutes together, seemingly no notice problems would exist if such a system as you have proposed were implemented. I would caution you however, that irrespective of any administrative convenience, all statutory mandates must be met. Regardless of whatever form, the proposed 'temporary index' might assume, 'proper indexing' must be maintained; moreover, both statutes mandate that entry into the 'record' [§ 30-9-30] and into the index [§ 30-9-50] shall take place 'immediately'.

As you are aware, this Office cannot and should not become involved in administrative problems encountered by county offices. However, I would hasten to add that any system which you devise must be in accord with these specific statutes, and thus would strongly urge that the proposed preliminary system contain all of the information as a standard index to these records and comport with § 30-9-30, § 30-9-50 and any other specific statutes related to indexing. [See Code of Laws of South Carolina, § 30-5-10 through 30-11-70 (1976)].

As to the problem of the civil liability of the Clerk of Court, I would conclude that the standard for liability is no different from the standard of negligence or misfeasance with respect to the preparation or maintenance of the standard index. The case of [Armstrong v. Austin](#), 45 S.C. 69, 22 S.E. 763 (1895) represents the basic law in South Carolina as to the Clerk's liability for errors or omissions in indexing. The Court noted in that case [decided prior to the 1925 enactment now codified in § 30-9-30] that: There is nothing in the statute making the indexing any part of the recording; and therefore, the failure of the officer to perform a duty imposed upon him by a separate statutory provision, while it may subject him to an action, at the instance of a party who may suffer by his default, yet it cannot affect the validity or effect of the recording. [[Supra at p. 80](#); [see also 94 A.L.R. 1303](#)]. (Emphasis added).

*3 I would hope that this represents an adequate response to your inquiries.
Sincerely,

Robert D. Cook
Legal Assistant

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