

1978 S.C. Op. Atty. Gen. 139 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-108, 1978 WL 27771

Office of the Attorney General

State of South Carolina

Opinion No. 78-108

May 30, 1978

***1 SUBJECT: Liens, Personal Property, Real Property.**

SYLLABUS:

(1) As to personal property held jointly by an individual applying for credit and his spouse, an otherwise valid security agreement executed by the applicant and spouse is sufficient to make the property available to the creditor in the event of default, regardless of whether the spouse signs the underlying note or obligation.

(2) As to real property owned jointly by husband and wife, a renunciation of dower as well as execution by both husband and wife is necessary to make the real estate available to the mortgagee in the event of default.

Deirdre E. Shanahan
Attorney
Division of Credit Practices
Federal Trade Commission

QUESTION: When a married applicant applies for individual credit and offers property owned jointly with the spouse as collateral, and both applicant and spouse sign a valid and otherwise enforceable security instrument, is it necessary for the creditor to obtain the spouse's signature, in addition to the applicant's signature, on the note or contract in order to insure that the property being offered as security is available to the creditor in the event of default?

STATUTES, CASES AND OTHER AUTHORITIES:

[South Carolina Constitution, art. 17 § 9 \(1895\)](#)

Code of Laws of South Carolina (1976)
Section 21–5–10

Sections 36–9–10 et seq.

Section 36–9–105(d)

Section 36–9–204(1)

[Bomar v. Wilkins](#), 154 S.C. 64, 151 S.E. 110, 68 A.L.R. 50 (1930); [Clanton v. Clanton](#), 229 S.C. 356, 92 S.E.2d 878 (1956); [Davis v. Davis](#), 223 S.C. 182, 75 S.E.2d 46 (1953); [Greet Bank & Trust Co. v. Waldrep](#), 155 S.C. 47, 151 S.E. 920 (1930); [Reed v. Kennedy](#), 2 Strob. 67 (1847); [Theodore v. Mozie](#), 230 S.C. 216, 95 S.E.2d 173 (1956); James J. White and Robert E. Summers, Uniform Commercial Code, p. 792, § 23–4.

DISCUSSION:

For purposes of this opinion, the fact situation is as follows:

A married applicant applies for individual credit. Pursuant to the lender's credit policies, collateral is always required to secure a loan in the dollar amount requested by the applicant, regardless of the applicant's individual creditworthiness. The potential collateral (real or personal property) for the loan is jointly owned by the applicant and the spouse. The applicant's spouse is willing to have the property become collateral for the applicant's debt and both will sign a valid and otherwise enforceable security instrument (mortgage, if real property collateral; security agreement, if personal property collateral).

I.

Personal Property

The validity of a security agreement covering personal property is governed by Article Nine of the Uniform Commercial Code, § 36–9–10 et seq., Code of Laws of South Carolina (1976). Generally, § 36–9–204(1) sets forth three prerequisites to the existence of a security interest:

A security interest cannot attach until there is agreement [subsection (3) of § 36–1–201] that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching.

***2** Assuming both applicant and spouse sign the security agreement, the questions then become whether value has been given and whether the debtor has rights in the collateral.

The statute involved [§ 36–9–204(1)] does not limit the recipient of the value given. The requirement is simply that the secured party must give value. James J. White and Robert S. Summers, Uniform Commercial Code, p. 792, § 23–4. Thus failure of the spouse who does not execute the note or contract to receive value will not prevent the security interest from attaching.

“Debtor” is defined in § 36–9–105(d) in such a way as to include the situation where one person furnishes security for another's debt:

... Where the debtor and the owner of the collateral are not the same person, the term ‘debtor’ means the owner of the collateral in any provision of the chapter dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires.

Assuming the other prerequisites have been met, when the owner of the collateral has rights in the collateral, regardless of whether this person executes the note or contract, the security interest will attach. If the security interest is then perfected, the collateral would then be available to the creditor in the event of default.

II.

Real Property

The estate of tenancy by the entirety no longer exists in South Carolina. [Davis v. Davis, 223 S.C. 182, 75 S.E.2d 46 \(1953\)](#). Nor does a husband have any curtesy rights in his wife's property in this state. [S.C. Const. art. 17, § 9 \(1895\)](#); § 21–5–10, Code of Laws of South Carolina (1976). Therefore, we are concerned only with tenants in common and joint tenants with right of survivorship. The effect of this opinion will be the same with respect to both forms of joint ownership.

The South Carolina Supreme Court has consistently held that a mortgage will not fail on the theory of want of consideration simply because the person signing the mortgage does not derive any personal benefit. Loss or detriment to the promisee is sufficient as a consideration. [Theodore v. Mozie](#), 230 S.C. 216, 95 S.E.2d 172 (1956); See also [Clanton v. Clanton](#), 229 S.C. 356, 92 S.E.2d 878 (1956); [Greer Bank & Trust Co. v. Waldrep](#), 155 S.C. 47, 151 S.E. 920 (1930). These cases all recognize that a mortgage may be given to secure the debt of a third person. Thus a spouse's execution of a mortgage would make the spouse's interest in the real estate available to the mortgagee in the event of default.

However, a wife would still have dower rights in the husband's interest in the real estate. [Reed v. Kennedy](#), 2 Stro. 67 (1847). The only way to deprive a wife of her dower interest is through her consent or her own act. [Bowman v. Wilkins](#), 154 S.C. 64, 151 S.E. 110, 68 A.L.R. 50 (1930). In order to extinguish the wife's dower rights in her husband's interest, it would be necessary to have the wife execute a renunciation of dower.

CONCLUSION:

- *3 1. An otherwise valid security agreement which covers jointly owned personal property and which is signed by the applicant and the applicant's spouse is sufficient to make the property available to the creditor in the event of default.
2. A renunciation of dower in addition to a wife's execution of the mortgage of jointly held real property is necessary to make the real estate available to the mortgagee in the event of default.

James W. Johnson, Jr.
Assistant Attorney General

APPROVED BY:

Victor S. Evans
Deputy Attorney General

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